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## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1890.**

No. ~~1188~~. 703 359 117

THEODORE LOWNDES, PLAINTIFF IN ERROR,

*vs.*

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED JUNE 12, 1890.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1890.

## No. 1188.

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THEODORE LOWNDES, PLAINTIFF IN ERROR,

*vs.*

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

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1 Supreme Court; Trial County, Suffolk.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff,
*against*
THEODORE LOWNDES, Defendant.
} Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated September 1, 1888.

N. S. ACKERLY,
*Plaintiff's Attorney.*

P. O. & office address: Northport, Suf. Co., N. Y.

To Theodore Lowndes:

The foregoing summons is served upon you without the State of New York, pursuant to an order of Thomas Young, county judge of Suffolk county, N. Y., dated the 19th day of October, 1888, and filed with the complaint in the office of the clerk of Suffolk county, at Riverhead, said county.

N. S. ACKERLY,
*Plaintiff's Attorney.*

Office & P. O. address: Northport, Suffolk Co., N. Y.

2 N. Y. Supreme Court; Trial County, Suffolk.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff,
*vs.*
THEODORE LOWNDES, Defendant.
} Complaint.

The complaint of the above-named plaintiff respectfully shows to this court:

First. That the plaintiff is a resident and citizen of the town of Huntington, county Suffolk, State of New York.

Second. That the trustees of the freeholders and commonalty of the town of Huntington and their successors is a body corporate, created and incorporated by and under three certain charters and patents granted respectively, the first by Richard Nichols, the governor general under James, Duke of York, of all his territories in America, and dated the 30th day of November, 1666; the second by Thomas Dongan, the governor general of the province of New York

under James the Second, King of England, and dated the second day of August, 1688; the third by Benjamin Fletcher, then governor general of the province of New York under William and Mary, King and Queen of England, and dated the fifth day of October, 1694, and by the laws of the Colony and State of New York, and which said charters and patents have been duly acknowledged, ratified, and confirmed by and under the Legislature of the
3 Colony of New York, the constitution and laws of the State of New York, and the laws, treaties, and Constitution of the United States.

Third. That the plaintiff is the lawful successor of the said trustees of the freeholders and commonalty of the town of Huntington, and, as such, in, under, and by virtue of said patents and grants and the laws of the State of New York, the lawful owner and seized in fee (subject to the full right of navigation) of all that certain tract of land, under water, in Huntington Bay, in the town of Huntington, county of Suffolk, State of New York, described as follows, to wit: Beginning at a point near the south shore of Huntington Bay, near the piles of the old East Neck dock, opposite the residence of Titus Conklin, at about three feet of water at low water, and running north till it comes to mud bottom; thence running westerly on the range of a tree on Hog Island seen through Lloyd's harbor; then southerly on the range of a monument set on the shore of Huntington bay to about three feet of water at low tide; thence easterly along the line of about three feet of water at low tide to the point or place of beginning, being nearly the whole of lots number 61 to 72, inclusive, and 86 and 91, inclusive, on a map of said Huntington Bay made by Oscar Darling, civil engineer, dated August 25, 1887, and filed in the town clerk's office of the town of Huntington August 29, 1887, said tract containing about three hundred acres, be the same more or less; that the plaintiff is also entitled to the exclusive possession and use thereof for oyster cultivation.

4 Fourth. That the defendant, Theodore Lowndes, has heretofore exercised and now exercises acts of ownership upon said lands and claims title thereto and a right to the exclusive possession thereof, and has planted or caused to be planted oysters thereon and claims an exclusive interest therein and unlawfully withholds the said lands from plaintiff.

That plaintiff, on the 23d day of May, 1888, at Norwalk, Connecticut, caused to be personally served on said defendant a notice of which the following is a copy, to wit:

"You will please to take notice that the Board of Trustees of the Town of Huntington hereby give you notice not to put or plant any oysters on any lands under the waters of Huntington Bay, town of Huntington, Suffolk county, and that they also demand and request you to take up and remove all oysters planted or claimed by you or in which you are interested and now on such lands; that they desire to lease said lands to parties applying and who have applied therefor for oyster cultivation.

You are further notified that said board are willing to give you a hearing, on your request, as to what length of time is a reasonable

and necessary one for you to have to remove such oysters as you may now have thereon or are interested in from such lands.

Dated May 7, 1888.

By order of said board of trustees:

By CHARLES R. STREET AND
N. S. ACKERLY,
*Their Attorneys and Counsel.*"

To Theodore Lowndes.

That said defendant, Theodore Lowndes, has not communicated with plaintiff or its attorneys in any manner in reference to said notice; that plaintiff is informed and believes that he has not taken up any of his oysters from said lands; that he has stated that he did not intend so to do in pursuance of said notice, and has stated that he shall continue planting oysters on said ground and should in no manner recognize said notice.

5

That said defendant still unlawfully withholds said lands from plaintiff.

Fifth. That the said lands are covered by the navigable tide-waters of Huntington Bay, and by reason thereof are not in actual occupation; that plaintiff has received applications for leases of said grounds for oyster cultivation from residents of the town of Huntington, and desires to make leases to such applicants, and to give the lessees the exclusive use of such grounds for oyster cultivation.

Wherefore the plaintiff demands judgment against the defendant, Theodore Lowndes, for the immediate and the exclusive control of said premises, together with the costs of this action.

N. S. ACKERLY,
*Plaintiff's Attorney.*

Office and P. O. address: Northport, Suffolk county, N. Y.

COUNTY OF SUFFOLK, }
*State of New York,* } *ss:*

Elbert Arthur, being duly sworn, says that he resides in the town of Huntington, Suffolk Co., and is a member of and president of the Board of Trustees of the Town of Huntington, Suffolk County, N. Y., who is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true, and the said plaintiff as a board have authorized the commencement of this action.

6

ELBERT ARTHUR.

Sworn to before me this 1st day of September, 1888.

[L. S.] F. B. OLMSTEAD,
*Notary Public, Suffolk Co., N. Y.*

Supreme Court, Trial County of Suffolk.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff,
*against*
THEODORE LOWNDES, Defendant.
} Affidavit.

COUNTY OF SUFFOLK, *State of New York*, } ss:

William H. Skidmore, of Suffolk county, being duly sworn, says that he is under sheriff of said county of Suffolk, N. Y.; that he received a copy of the summons and complaint in this action, the original of which are attached hereto, from the plaintiff's attorney on the 8th day of October, 1888, with instructions to serve on Theodore Lowndes, the defendant; that the said Theodore Lowndes is a non-resident of the State of New York and resides at Norwalk, State of Connecticut; that said defendant owns an oyster steamer
7 and is interested in oysters planted in the town of Huntington; that deponent has made inquiry of Joshua M. Devon, who for a number of years watched the oyster beds of defendant and knows all about his oyster business in this town; that deponent was informed by him that said defendant did not personally run his oyster steamer and was seldom with her, and that he seldom came to New York State; that he was troubled with his eyesight, and that deponent would not be able to find him without going to Norwalk. Deponent further inquired of Jacob Jarvis, who lives neighbor to his (Lowndes') father-in-law, and was informed by him that he was seldom in this State and could not be found without going to Norwalk. Deponent further inquired of E. Johnson, who is acquainted with the oyster business in this town and those engaged in it and with the habits of defendant in respect to coming in this State, and was informed by him that the only way he could be found would be by going to Norwalk; that deponent has gone to the shore near his oyster beds, but has been unable to find him; that deponent, after diligent inquiry and diligent efforts, has been unable to find said Theodore Lowndes within this State to serve said summons and complaint.

W. H. SKIDMORE,
*Under Sheriff, Suffolk Co., N. Y.*

Sworn to before me this 17th day of October, 1888.
CHARLES R. STREET,
*Notary Public, Suffolk Co., N. Y.*

8 COUNTY OF SUFFOLK, *State of New York*, } ss:

N. S. Ackerly, of Suffolk county, N. Y., being duly sworn, says that he is an attorney and counsellor at law and is attorney for the plaintiff in the foregoing-entitled action, the original summons and complaint being hereto attached; that he gave to William H. Skidmore, under sheriff of Suffolk county, N. Y., a copy of said sum-

mons and complaint, with instruction to serve on the defendant, Theodore Lowndes; that said defendant resides in the State of Connecticut and is not a resident of the State of New York; that due diligence has been used by said under sheriff to find said defendant in this State, so as to serve him with said summons and complaint, and that said defendant cannot, after such due diligence and inquiry, be found within this county or State.

That the complaint sets forth in this action that plaintiff is the owner "of all that certain tract of land under water in Huntington Bay, in the town of Huntington, county of Suffolk, N. Y., described as follows, to wit: Beginning at a point near the south shore of Huntington Bay, near the piles of the old steamboat dock, opposite the residence of Titus Conklin, at about three feet of water at low tide, and running north till it comes to mud bottom; thence running westerly on the range of a tree on Hog Island seen through Lloyd's harbor; then southerly on the range of a monument set on the shore of Huntington Bay to about three feet of
9 water at low tide; thence easterly along the line of about three feet of water at low tide to the point or place of beginning, being nearly the whole of lots 61 to 72, inclusive, and 86 to 91, inclusive, on a map of said Huntington Bay made by Oscar Darling, civil engineer, dated August 25, 1887, and filed in the town clerk's office of the town of Huntington August 29, 1887, said tract containing about three hundred acres, be the same more or less, and that the plaintiff is entitled to the exclusive possession and use thereof for oyster cultivation.

"That the defendant, Theodore Lowndes, has heretofore exercised and now exercises acts of ownership upon said lands and claims title thereto and a right to the exclusive possession thereof, and has planted or caused to be planted oysters thereon, and claims an exclusive interest therein, and unlawfully withholds the said lands from plaintiff."

That the said complaint demands judgment against the defendant, Theodore Lowndes, for the immediate and exclusive control of said premises, as hereinbefore described and as described in said complaint.

N. S. ACKERLY.

Sworn to before me this 17th day of October, 1888.

WILLIAM B. CODLING,
*Notary Public.*

10 Supreme Court, Trial County of Suffolk.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff,
*against*
THEODORE LOWNDES, Defendant.

Order to Serve Summons by Publication.

On reading and filing a summons issued in the above-entitled action and a duly verified complaint therein; also the affidavits of William H. Skidmore, under sheriff of Suffolk county, and N. S.

Ackerly, plaintiff's attorney, showing, among other things, a sufficient cause of action against the defendant, Theodore Lowndes; that he is a non-resident of the State of New York and resides at Norwalk, State of Connecticut; that he cannot be found in this State, so that said summons may be served on him, and that the complaint demands judgment affecting certain specific real property in this State: Now, on motion of N. S. Ackerly, plaintiff's attorney, it is hereby ordered that service of the above-mentioned summons upon the said Theodore Lowndes be made by publication thereof in two newspapers, to wit, the Suffolk Bulletin and the Long Islander, each published in the town of Huntington, Suffolk Co., once a week for six successive weeks, or, at the option of the plaintiff, by service of the summons and of a copy of the complaint and this order
11 without the State upon the defendant personally. It is further ordered that on or before the day of the first publication the plaintiff deposit in the post office at Northport, Suffolk Co., N. Y., one copy of said summons, complaint, and this order contained in a securely closed post-paid wrapper, directed to Theodore Lowndes, Norwalk, State of Connecticut.

Dated at Huntington, Suffolk Co., N. Y., this 19th day of October, 1888.

THOMAS YOUNG,
*Co. J., Suffolk County.*

SUFFOLK COUNTY, } ss:
*Clerk's Office,* }

I, Orange T. Fanning, clerk of said county and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that I have compared the annexed copy —
[L. S.] summons and complaint, affidavits, and order to serve summons by publication *in* The Board of Trustees of the Town of Huntington, plaintiff, against Theodore Lowndes, defendant, with the originals filed in this office on the 20th of October, 1888, and that they are just and true copies of such originals and the whole thereof.

Witness my hand and the seal of said county, at Riverhead, N. Y., this 12th day of February, 1889.

ORANGE T. FANNING, *Clerk.*

12 Know all men by these presents that we, Theodore Lowndes, of Rowayton, Fairfield county, Connecticut, as principal, and Joshua V. Van Name, of Mariners' Harbor, Richmond county, New York, and Jacob I. Housman, of Port Richmond, Richmond county, New York, as sureties, are held and firmly bound unto The Board of Trustees of the Town of Huntington in the penal sum of five hundred dollars, lawful money of the United States of America, to be paid to the said The Board of Trustees of the Town of Huntington, its successors or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the first day of February, 1889.

Whereas an action has been commenced in the supreme court of the State of New York, Suffolk county being named by plaintiff as the place of trial, by the said The Board of Trustees of the Town of Huntington, a citizen of the State of New York, against the said Theodore S. Lowndes, a citizen of the State of Connecticut, and the matter in disput- in said action exceeds the sum or value of two thousand dollars, exclusive of interest and costs;

And whereas the said defendant is about to present his petition, pursuant to the act of Congress in such case made and provided, for the removal of the said cause into the next circuit court of
13 the United States, to be held in and for the eastern district of New York, where the said suit is now pending:

Now, therefore, the condition of the above obligation is such that if the said Theodore Lowndes shall enter in the said circuit court of the United States, to be held in and for the eastern district of New York on the first day of its next session, a copy of the record in such suit, and shall well and truly pay all costs that may be awarded in said suit by said circuit court of the United States if said court shall hold that said suit was wrongfully removed thereto, and shall also then and there appear and enter special bail in said suit if special bail was originally requisite therein, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THEO. S. LOWNDES. [SEAL.]
JOSHUA V. VAN NAME. [SEAL.]
JACOB I. HOUSMAN. [SEAL.]

Sealed and delivered in presence of—
J. F. COFFIN.
W. M. NEGUS.

STATE OF NEW YORK, }
*City and County of New York,* } ss:

Joshua V. Van Name, being duly sworn, says that he is one of the sureties in the above bond named, and resides at Mariners' Harbor, Richmond county, New York; that he is a freeholder within this State and is worth the sum of one thousand dollars over
14 and above all his debts and liabilities, exclusive of property exempt by law from levy and sale under an execution.

JOSHUA V. VAN NAME.

Sworn to before me this 1st day of February, 1889.

J. F. COFFIN,
*Notary Public, Kings Co.*

Certificate filed in N. Y. Co.

STATE OF NEW YORK, }
*City and County of New York,* } ss:

Jacob I. Housman, being duly sworn, says that he is one of the sureties in the above bond named, and resides in Port Richmond, Richmond county, New York; that he is a freeholder within this

State, and is worth the sum of one thousand dollars over and above all his debts and liabilities, exclusive of property exempt by law from levy and sale under an execution.

JACOB I. HOUSMAN.

Sworn to before me this 1st day of February, 1889.

WILLIAM M. NEGUS,
*Notary Public*, 32.

STATE OF NEW YORK, }
*City and County of New York*, } *ss:*

On the 1st day of February, A. D. 1889, before me personally came Theodore S. Lowndes and Joshua V. Van Name, to me known to be the individuals described in and who executed the foregoing
15 instrument, and severally acknowledged that they executed the same.

J. F. COFFIN,
*Notary Public, Kings County.*

Certificate filed in N. Y. Co.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On the 1st day of February, A. D. 1889, before me personally came Jacob I. Housman, to me known to be one of the individuals described in and who executed the foregoing instrument, and acknowledged that he executed the same.

WILLIAM M. NEGUS,
*Notary Public*, 32, *N. Y. City.*

SUFFOLK COUNTY, }
*Clerk's Office*, } *ss:*

I, Orange T. Fanning, clerk of said county and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that I have compared the annexed copy — bond with the original bond on
[L. S.] removal to U. S. circuit court filed in my office February 5, 1889, in the action Trustees, &c., of Huntington *vs.* Theodore S. Lowndes, and that it is a just and true copy of such original and of the whole thereof.

Wi-ness my hand and the seal of said county, at Riverhead, N. Y., this 5th day of February, 1889.

ORANGE T. FANNING, *Clerk.*

16 Supreme Court, Suffolk County.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff,
*against*
THEODORE S. LOWNDES, Defendant.

To the supreme court of the State of New York:

The petition of the above-named defendant respectfully shows that the above-entitled action is a suit of a civil nature at law now

pending in this court, and that the controversy therein is between citizens of different States—that is to say, between the above-named plaintiff, The Board of Trustees of the Town of Huntington, which is and was at the commencement of this action a body corporate created and incorporated by and under certain charters and patents and by the laws of the State of New York and a citizen of that State, and the above-named defendant, who is and was at the commencement of this action a citizen of the State of Connecticut.

That the matter in dispute in such suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, the plaintiff claiming to recover in said suit the possession of a tract of land
17 under water, consisting of 300 acres situate in Huntington Bay, in the town of Huntington, county of Suffolk and State of New York, the value of which is at least five thousand dollars.

That your petitioner has made and is about to file herewith a bond with good and sufficient sureties for his entering in the United States circuit court, to be held in the district where such suit is pending, to wit, in the eastern district of New York, on the first day of its next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said court if the said court shall hold that such suit was wrongfully or improperly removed thereto, and also for his appearing and entering special bail in such suit, if special bail was originally requisite therein, pursuant to the statutes of the United States in such case made and provided.

That by the laws of the State of New York, in which this suit is brought, the defendant is not required to plead, answer, or demur to the complaint of the plaintiff herein until the 4th day of February, 1889, and has not yet answered the complaint.

That no previous application for an order of removal has been made herein.

Wherefore your petitioner prays that said bond may be accepted, and that the said suit may be removed into the circuit court of the United States for the eastern district of New York, pursuant to the laws of the United States, and that no further proceedings be had therein in this court.

THEODORE S. LOWNDES, *Petitioner.*

18 STATE OF NEW YORK, }
*City and County of New York,* } ss:

Theodore S. Lowndes, being duly sworn, says that he is the petitioner named in the foregoing petition, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

THEO. S. LOWNDES.

Sworn to before me this 1st day of February, 1889.

J. F. COFFIN,
*Notary Public, Kings Co.*

Certificate filed in N. Y. Co.
2—1188

At a special term of the supreme court, held at the court-house, in White Plains, in the county of Westchester, on the 2d day of February, 1889.

Present: Honorable J. O. Dykman, justice.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON
*against*
THEODORE S. LOWNDES.

The defendant above-named having presented his petition praying for the removal of this cause into the circuit court of the
19 United States for the eastern district of New York, pursuant to the statutes of the United States in such case made and provided, and having offered good and sufficient security pursuant to the requirements of said statutes:

Now, on motion of Martin J. Keogh, attorney for the defendant—

It is ordered that this court accepts the security offered by the petitioner and grants the said petition, and that said cause be removed for trial into the next circuit court of the United States, to be held in and for the eastern district of New York, and that this court do proceed no further therein, and that all proceedings in this court in said cause be, and the same are hereby, stayed.

J. O. DYKMAN, *J., S. C.*

SUFFOLK COUNTY, *Clerk's Office,* } *ss:*

I, Orange T. Fanning, clerk of said county and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify
[L. S.] that I have compared the annexed copy, petition, and order with the original order and petition for removal to U. S. court in Trustees, &c., of Huntington *vs.* Theodore S. Lowndes, filed in my office February 5, 1889, and that it is a just and true copy of such original and of the whole thereof.

20 Witness my hand and the seal of said county, at Riverhead, N. Y., this 5th day of February, 1889.

ORANGE T. FANNING, *Clerk.*

Endorsed: Certified copy of record. Filed February 13, 1889.

U. S. Circuit Court, Eastern District of New York.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON
*vs.*
THEODORE S. LOWNDES.

This cause having originally been commenced in the supreme court of the State of New York, held in and for the county of Suffolk, and having been thence removed into this court on the application of the defendant, and said defendant having this day duly filed and entered in this court a certified copy of the record in the said supreme court, it is *on* now, on motion of Martin J. Keogh, defendant's attorney—

Ordered that the action do proceed in this cause in the same manner as if it had been brought therein by original process, and that the appearance of said defendant by Martin J. Keogh, its attorney, be, and the same hereby is, entered.

Dated February 13, 1889.

Endorsed: Rule entered February 13, 1889.

21 Circuit Court of the United States for the Eastern District of New York.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff,
*against*
THEODORE LOWNDES, Defendant.

The answer of the above-named defendant to the complaint of the above-named plaintiff respectfully shows to the court:

First. This defendant admits the allegations contained in paragraph I of said complaint. He also admits the allegations contained in paragraph IV of said complaint, except the allegation (which occurs twice in said paragraph) that he unlawfully withholds the lands therein referred to from plaintiff, which allegation he denies.

Second. This defendant alleges that he has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph II and the first 21 words of paragraph III of said complaint.

Third. This defendant denies the remaining allegations of paragraph III of said complaint.

Fourth. And this defendant, further answering said complaint and as a further answer and defence thereto, alleges that neither plaintiff, his ancestor, predecessor, or grantor, was seized or
22 possessed of the premises described in the complaint or any part thereof within twenty years before the commencement of this action, but that defendant, his ancestors, predecessors, and grantors, have held and possessed the premises adversely to the pretended title of the plaintiff for more than twenty years last past before the commencement of this action, and have been in the sole and exclusive possession of the same for such period under a claim of right, claiming title thereto.

That in the year 1866 this defendant entered upon the premises described in the complaint and began planting oysters thereon, and from that period until the present time has planted or caused to be planted thereon and has claimed and still claims title thereto, and that his possession thereof from the said year 1866 until the commencement of this action has been peaceful and undisturbed.

And this defendant further alleges that the said plant of defendant is of great value to him and is worth at least the sum of ten thousand dollars.

Wherefore this defendant demands that said complaint be dismissed with costs.

MARTIN J. KEOGH,
*Defendant's Attorney, Temple Court, New York.*

CITY AND COUNTY OF NEW YORK, *ss:*

Theodore Lowndes, being duly sworn, says that he is the defendant above named; that he has read the foregoing answer,
23 and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

THEO. S. LOWNDES.

Sworn to before me this 21st day of February, 1889.

J. F. COFFIN,

[L. S.] *Notary Public, Kings Co.*

Certificate filed in N. Y. Co.

Endorsed: Answer. Filed February 23d, 1889.

At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-house, in the city of Brooklyn, on the 14th day of November, 1889.

Present: Honorable E. Henry Lacombe, circuit judge.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON,
Plaintiff,
*vs.*
THEODORE S. LOWNDES.

Cause called. Trial ordered.

24 Appearances: Mr. Ackerly, for plaintiff; Messrs. Street & Platt, of counsel; Mr. Keogh, for defendant.

Jury drawn and sworn.

C. R. Street addresses jury for plaintiff.

* * * * * * *

Suspended to November 15, 1889.

NOVEMBER 15, 1889.

Hearing resumed.

* * * * * * *

Suspended to November 18, 1889.

NOVEMBER 18, 1889.

Hearing resumed. Same appearances.

* * * * * * *

Suspended to November 19, 1889.

NOVEMBER 19, 1889.

Hearing resumed. Same appearances.

Mr. Platt moves to direct verdict for plaintiff herein.

Mr. Keogh moves to go to the jury on certain questions.

Motion by Mr. Platt granted.

By direction of the court the jury returns verdict for the plaintiff.

* * * * * * *

A true extract from the minutes.

B. LINCOLN BENEDICT, *Clerk.*

25 United States Circuit Court, Eastern District of New York.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff, *against* THEODORE LOWNDES, Defendant. } Before Hon. E. Henry Lacombe, C. J., and a Jury.

BROOKLYN, N. Y., *Nov.* 14*th*, 1889.

Appearances: Martin J. Keogh, Esq., for the defendant; N. S. Ackerly, Esq., for the plaintiff; Henry C. Platt, Esq., and Charles R. Street, Esq., of counsel.

A jury was impaneled and sworn.

Mr. Platt opened the case for the plaintiff, and Mr. Street proceeded to offer evidence on the part of plaintiff.

United States Circuit Court, Eastern District of New York.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff, *against* THEODORE LOWNDES, Defendant.

And now, on this day, to wit, the 14th day of November,
26 1889, before Honorable E. Henry Lacombe, at a circuit court held at the city of Brooklyn, in the said eastern district of New York, the aforesaid issue so joined as between the said parties, as by the record more fully appears, came on to be tried by a jury duly empanelled and sworn for that purpose, said plaintiff being represented by N. S. Ackerly, its attorney, and Henry C. Platt and Charles R. Street, its counsel, and the defendant by Martin J. Keogh, his attorney and counsel; and the plaintiff, to maintain and prove the issues on their part, produced and called the following evidence and witnesses:

Mr. STREET: I offer the following documents in evidence: Patent or grant by the colonial governor, Richard Nichols, to the inhabitants of Huntington, dated 1666. This is a certified copy from the office of the secretary of state and under the seal of the State.

Mr. KEOGH: There will be a large number of ancient documents offered, and I desire now to take an objection which, if the court please, will be understood as referring to them all. I object on the ground that it is incompetent, immaterial, and irrelevant, and for the further reason that it does not appear from the said patent or the contents thereof whether the waters of Huntington Bay or the land under said waters are referred to within it; nor does it appear from said patent or the contents thereof what are the limits of the town of Huntington; and for the further reason that the
27 patent does not show or the language within it what *what* are the bounds of the bay and what are the bounds of the town.

Objection overruled. Defendant excepts.

The paper is marked Plaintiff's Exhibit No. 1.

*A Patent Graunted unto the Inhabitants of Huntington.* (1666 *Nov.* 30)

Richard Nicolls Esqr. Governor Generall under his Royall Highnesse James Duke of Yorke and Albany &c. of all his Territoryes in America To all to whome these pnts shall come sendeth Greeting

Whereas there is a Certaine Towne within this Governmt commonly called and knowne by the name of Huntington Scituate and being on Long Island now in the Tenure of Occupacon of Severall ffreeholders and inhabitants there residing who having heretofore made Lawfull Purchase of the land thereunto belonging have likewise Manured and Improved a Considerable Part thereof and Settled a Competent Number of ffamilyes there upon Now for a Confirmacon unto the said ffreeholders and Inhabitants in their Enjoymt & Possession of the prmisses Know Yee that by vertue of ye Commisson and Authority unto mee given by his Royall Highnesse I have Ratified confirmed and graunted and by these pnts do hereby ratifie Confirme and Graunt unto Jonas Wood, William Leveredge, Robert Seely, John Ketcham, Thomas Scudamore, Isaach Plott, Thomas Joanes and Thomas Weekes in the behalfe of themselves and their Associates the ffreeholders and Inbabitants of the sd Towne their Heires Successors and Assignes all ye Lands that already have been or hereafter shall bee Purchased for and on the behalfe of
28 the said Towne of Huntington whether from the Natives Proprietors or others within the Limitts and Bounds herein exprest (vizt) that is to say from a Certaine River or Creeke on the west comonly called by the Indyans by the Name of Nackaquatack and by the English the Coldspring to Stretch Eastward to Nasaquack River on the North to bee Bounded by the Sound runing betwixt Long Island and the Maine and on ye South by the Sea Including there Nine Severall Necks of Meadow Ground all wch Tract of Land together with the sd Necks thereunto Belonging wthin the Bounds and Limitts aforesaid and all or any Plantacon there upon are to belong to the said Towne of Huntington as also all Havens Harbours Creekes Quarryes Woodland Meadowes Pastures Marshes Waters Lakes ffishing Hawking Hunting and ffowling And all other Proffitts, Commodityes, Emolumts, and Hereditamts to the said Land and prmisses within the Limitts and Bounds aforementioned described belonging or in any wise appertaining To have & to hold the said Lands and Necks of Lands Hereditamts and prmisses with their and every of their Appurtenances and of every Part & Parcell thereof to the said Patentees and their Associates to the proper use and behoofe of the said Patentees and their Associates their Heires Successors and Assignes forever; And I do likewise hereby Confirme and Graunt unto the said Patentees and their Associates their Heires Successors and Assignes all the Priviledges belonging to a Towne within this Governmt and that the Place of their prsent
29 Habitacon shall continue and retaine the Name of Huntington by wch name it shall bee distinguisht and knowne in all Bargaines and Sales Deedes Records and Writings They the said Patentees and their Associates their Heires Successors and Assignes

Rendring and Paying such Dutyes and Acknowledgmts as now are or hereafter shall bee Constituted and Establisht by the Lawes of this Colony under the Obedience of his Royall Highnesse his Heires and Successors Given under my hand and Seale at ffort James in New Yorke the 30th Day of November in the 18th Yeare of his Maties Raigne And in the Year of our Lord God 1666.

RICHARD NICOLLS.

I do hereby Certify the aforegoing to be a true copy of the original record. The Character & fifteenth line being written on a razure and the word *hereby* between seventeenth and eighteenth lines being interlined.

Compared therewith By Me—

LEWIS A. SCOTT, *Secretary.*

STATE OF NEW YORK, }
*Office of the Secretary of State,* } ss:

I have compared the preceding copy of letters patent with the record thereof in this office, in Book Number 1 of Patents, at page 73, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, the fourth day of November, one thousand eight hundred and eighty-nine.

[L. S.]

DIEDRICH WILLERS,
*Dep. Secretary of State.*

The purport of said document was stated to the jury.

Mr. STREET: We offer in evidence the patent by Gov. Thomas Dongan to the inhabitants of Huntington, date 1688.

The same objection, ruling, and exception.

The purport of the document was stated to the jury.

Marked plaintiff's Exhibit No. 2.

1688 August 2. Recorded for ye Towne of Huntington.

Thomas Dongan Capt. Generall & Governr. in cheife of New Yorke & Territorys Depending thereon in America under his most Sacred Majesty James ye Second by ye Grace of God King of England Scotland France & Ireland Defender of ye faith &c.: To all to whome these prsents shall come, Sendeth Greeting:

Whereas Richard Nicholls, Esqr. Governor. Generll: undr his their Royall Highness James Duke of Yorke & Albany &c: now his prsent Majesty of all his Territoryes in America Did by a Certaine Writeing or Patent undr his Hand and Seale beareing Date ye thirtyeth Day of November in ye Eighteenth yeare of the Reigne of our late Soveraigne Lord Charls ye Second &ca of blessed memory & in ye yeare of our Lord God Sixteene hundred Sixty six by vertue of ye Comcon & authority unto him Given by his sd. their Royall Highness now his Present Majestie as aforesd. Ratifie Confirme & Grant unto Jonas Wood William Severedge Rob-

ert Seely John Ketcham Thomas Scudmore Isaac Plott Thomas Joanes & Thomas Weecks as Patentees in ye behalfe of themselves & their associates the Freeholders & Inhabitants of ye Towne of huntinton Scituate Lyeing & being within this Govermt upon Long Island in the County of Suffolke now in the Tennoure & Occupation of Severall Freeholders & Inhabitants there Resideing who haveing theretofore made Lawfull Purchase of the Lands thereunto belonging have likewise Manured and improved a Considerable Part thereof & Settled a Competent Number of Familyes thereupon all ye Lands yt already had been or thereafter should bee Purchased for and on the behalfe of the sd Towne of Huntington whether from the Native Proprietors or others within ye Limitts & Bounds therein Exprest vizt. from a Certaine River or Creeke on ye West Comonly Called by ye Indians by ye name of Nackaquatack & by the English ye Cold Spring Do Stretch Eastward to Nesaquas Rivr. on the North to be Bounded by ye Sound runing betwixt Long Island & ye maine and on ye South by the sea incluedeing there nine Several Necks of Meadow Ground all which Tract of Land togeather with ye said nine Necks thereunto belong-in within ye Bounds & Limitts aforesd & all or any Plantacons thereupon are to belonge to the said Towne of Huntingtonn as alsoe all Havens Harbors Creeks Quarries Woodlands Meadows Pastures Marsh's Lakes ffishing hawking hunting & fowling and all other Proffitts Comodity's Emoluments and Hereditamts to ye said Land and Premissess within
32 ye Limitts & Bounds aforemenconed Described belonging or in anywise appertaineing To have & to hold all & singuler ye said Lands & Necks of Lands Hereditamts & Premises with their and every of ther appurtenances & every Part & Parcell thereof to ye said Patent's and theire associates theire heires Secessors & assignes forever and did likewise thereby Confirme and Grant unto ye s'd Patentes and their associates theire Heires Successors & assignes all ye Previlidges belonging to any Towne within this Government & yt ye Place of their Present Habitation should continue & Retaine ye Name of Huntington by w'ch name it should be Distinguish'd & knowne in all Bargaines & States Deeds Records & Writeings they ye s'd Patentes & their associates their Heirs Successors & assignes Rendering & payeing such Dutyes & acknowledgments as their were or thereafter should be Constituted & Established by ye Lawes of this Collony under ye obedience of his Royall Highness his Heires & Successors as by ye said Patent entered & Recorded in ye Secretarys office att New Yorke Relation being thereunto had may more fully & att Large appeare & whereas ye free holders of ye said Towne of huntingtonn have made applicacon unto mee yt I would grant & Confirme ye Premisses by Patent under ye Seale of ye Province to them their Heires & assignes forever now Know yee yt I ye said Thomas Dongan by vertue of ye Power & authority to mee Derived from his most Sacred Majeste affores'd in Pursuance of the same for & in Consideracon of ye Quitt Rent herein after Reserved & other Good & Lawfull Considerations mee thereunto
33 moveing have Given Granted Ratified & Confirmed & by these pr'sents Doe Give Grant Ratifie & Confirme unto Thomas

Fleet Senior Epenetus Platt Jonas Wood Senior James Chichester Senior Joseph Bayly Thomas Porrell Senior John James Isaac Platt & Thomas —— Freeholders & inhabitants of Huntingtonn herein Erected & made one Body Corporate & Publique & Willed & Determined to be Called by ye Name of ye Trustees of ye ffreeholders & Comonalty of ye Towne of Huntingtonn & their Successors all ye aforecited Tracts of Land within ye Limitts & Bounds afores'd together with all & Singuler ye Houses Messuages Tenements Buildings Mills Milldames fenceing Enclou'es Gardens Orchards feilds Pastures Woods Underwoods Trees Timber feedings Common of Pasture Meadows Marsues Swamps Plaines Rivers Rivoletts Wat'rs Lakes Ponds Brooks Streames Beaches Quarries Creeks Harbours Highwayes & Easements fisheing hawking hunting & fowleing Mines Minuralls (Silver & Gold Mines Except'd) & all Franchizes Proffitts Commodityes & Hereditaments whatsoever to ye said Tracts of Lands & Premisses belonging or in anywise appertaining or therewithall used accepted Reputed or taken to belong or in any wise appertaine to all intents and purposes & Constructions whatsoever as alsoe all and Singuler ye Rents arrearages of Rents Issues & Profitts of ye said Tract of Land & Premises heretofore Due & Payable T have & to hold all & Singuler ye beforrecited Tract of Land & Premises within ye Bounds & Limitts afforementioned with theire & every of theire appurtenances unto ye said Thomas Fleet Senior Epenetus Platt Jonas Wood Senior James Chechester
34 Senior Thomas Powell Senior Joseph Bayly Thomas — John Samnes & Isaac Platt Trustees of ye Freeholders & Comonalty of ye Towne of Huntingtonn & their Successors forever to & for ye Severall & Respective uses following & to noe other uses intents & purposes whatsoever that is to say as for & Concerning all & Singuler ye Severall & Respective Parcell of Land & Meadows Part of ye Granted Premisses in any wayes taken up and appropriated Eighter by Pattent under ye hand of any of his Majesty Governors in this Province & Sealed with ye Seal thereof or by Perticuler Divisions & Allotments before ye day of ye Date hereof unto ye Severall & Respective Present Freeholders or inhabitants of ye said Towne of Huntingtonn by vertue of ye before Recited Deed or Patent to ye use & behoofe of ye said Freeholders & inhabitants Respectively & to their Severall & Respective Heires & assignes forever & as for & Concerning all & every such Parcell or Parcells Tract or Tracts of Land Remainder of ye Granted Premises not taken upp or appropriated to any Perticuler Person or Persons by vertue of ye before recited Deed or Patent to ye use & behoofe of ye present ffreehold's & inhabitants their Heires Successors & assignes forev'r in Proportion to their Severall & Respective Settlements Divisions & allotments as Tennants in Comon without any manner Lett Hinderance or Molestation to be had or Reserved upon Pretence of Joynt Tennancy or Survivorshipp anything Contained to ye Contrary in any wise notwithstanding alwaies Saveing to his most Sacred
35 Majestye afores'd his Heirs & Successors ye Severall Rents & Quitt Rents reserved Due & Payable from Severall Per ons inhabiting within ye Limmitts & Bounds affores'd by vertue of

Former Grants to them made & Given & alsoe Saveing to his most Sacred Majestye affores'd his Heires & Successors all ye Necks of Lands y^t lye to ye South within ye Limitts & bounds affores'd & ye Lands to ye Northward of ye same y^t remaine unpurchased from ye Native Indians anything Contained herein to ye Contrary in any wayes Notwithstanding to bee holder of his said Majestye his Heires & Successors in free & Common Soccage according to ye Manner of East Greenwich in ye County of Kent within his Majestye Realms of England Yielding Rendring & Paying therefore yearly & every Yeare from henceforth to our Soveraigne Lord ye King his Heires & Successors or to such officer or officers as shall bee appointed to Receive ye same one Lamb or five Shillings Curr't Money of this Province upon ye five and twentyeth Day of March att New Yorke in full of all Rents or former Reserved Rents Services Acknowledgments & Demands whatsoever & further by vertue of ye Power & authority to mee the said Thomas Dongan Given as aforesaid & in persueance of ye same & for ye reasons & Considerations above Recited I have Willed Determined Declared and Granted by these Presents Doe Will Determine Declare & Grant y^t ye said Inhabitants & freholders ye freemen of Huntingtonn affores'd Comonly Called by ye name of ye freeholders & inh bitants of ye Towne of Huntingtonn or by whatsoever Name or Names they are Called or named & their Heires &
36 Successors forever hence forward are & shall be one Body Corporate & Politique in Deed & Name by ye Name of ye Trustees of ye Freeholders & Comonalyty of ye Towne of Huntingtonn & them by ye Name of ye Trustees of ye Freeholders & Commonnalyty of ye Towne of Huntingtonn one Body Corporate & Politique in Deed & Name I have Really & Fully for his said Majesty his Heires and Successors Erected & Made Ordained Constituted & Declared by these pr'sents & yt by ye same Name they have Succession forever & yt they & Their Successors by ye Name of ye Trustees of ye Freeholders and Commonality of ye Towne of Huntingtonn be and shall be forever in future times Persons able & Capable in Law to have Perceive & Receive and Possess not only all & Singular ye Premises but other Messuages Lands Tenements Privileges Jurisdictions Franchizes & Hereditaments of whatsoever kind or species they shall be to them and theire Successors in fee forever or for ye terme of a Yeare or Yeares or otherwise whatsoever manner itt bee and also Goods Chattles & all other things of whatsoever name Nature Quallty or Species they shall bee and alsoe to Give Grant Release aliene assigne & Dispose of Lands Tenements Hereditaments & all & every other thing & things act & acts to doe & Execute by ye Name affores'd & yt by ye aame Name of Trustees of ye Freeholders & Comonnality of ye Towne of Huntingtonn to Plead & be impleaded answere & be Answered unto Defend
& be Defended they are & may be Capable in whatsoever
37 Place and Places and before whatsoever Judges & Justices or other Persons Officialls of his said Majesty's his Heires & Successors in all & all manner of actions Plaints Suites Complaints Cause Matters & Demands whatsoever of wt Kind Quallity

& Species ye same bee in manner & Forme as any other of his Majestye Leidge People within this Province Can or are able to have require receive possess enjoy retaine Give Grant Release aliene assigne & Dispose Pleade & be impleaded answer & to be answered unto Defend & be defended Doe Permitt & Execute & for ye better Inableing ye Trustees of ye Freeholders and Commonality of ye Towne of Huntingtonn affores'd in Doeing & Executing all & Singular ye Premises I have Willed Granted & Determined & by these prsents Doe Will Grant & Determine that from henceforward & forever hereafter ye said Trustees of the Freeholders & Comonality of ye Towne of Huntingtonn Doe & may have & use a Comon Seale wch shall Serve to Execute ye causes & affaires whatsoever of them and their successors & further I Will & by these prsents in ye behalfe of his said Majestye his Heires & Successors that henceforward & forever more there be and shall be Trustees of the freeholders & Commonality of ye Towne of Huntingtonn afforesaid to be Chosen & Elected as in these prsents hereafter is menconed who shall bee & shall bee Called ye Trustees of the Freeholders & Commonality of ye Towne of Huntingtonn & they & their Successors shall & may at all Convenient times hereafter upon *upon* a Publique Summons from any three of ye Trustees aforesd for ye time
38 being assemble & meet togeather in ye Towne house of ye said Towne or in such Publique Place as shall be from time to time appointed to make such acts & orders in Writeing for ye more orderly Doeing of ye Premisses as they ye said Trustees of ye Freeholders & Commonality of ye Towne of Huntingtonn afforesaid & Theire Successors from time to time shall & may think Convenient soe allways as ye said acts & Orders be in noe way Repugnant to ye Lawes of England & of this Province wch now are or hereafter may be Established & that they be not in any wayes against ye true intent & meaneing of this prsents & alsoe I will Ordaine & Determine y^t all & Singuler ye afforesd acts & orders from time to time shall be made & Ordained by ye vote of ye Major Part of ye said Trustees of ye Freeholders & Commonality of ye Towne of Huntingtonn affoesd or at least by ye Major Part of such of them as shall from time to time assemble & meet togeather in manner as afforesd soe allwayes as there be not fewer in Number than six of the Trustees present at such meetings soe to be holden as afforesd & for ye better Execution of this Grant in this behalfe I have assigned Nominated Created Constituted & Made & by these presents Doe assign Nominate Create Constitute & make Thomas Fleet Senior Epenatus Platt Jonas Wood Senior James Chechester Senior Thomas Powell Senior Joseph Bayly —— —— John Sammes & Isaac Platt to Stand to bee the first Moderne Trustees of ye Freeholders & Commonality of ye Towne of Huntingtonn to Con-
39 tinue in ye afforesaid office from & after ye date of these presents untill ye time y^e others bee Elected & Chosen in their Stead according to ye manner & forme herein after Expressed & moveover I Doe by these presents for & on ye behalfe of his most sacred Majesty afforesd his Heirs & Successors appoint y^t ye Trustees of ye Freeholders & Commonality of the Towne of Hunting-

tonn & Clerke within ye Towne of Huntingtonn afforesd be yearely Chosen on ye first Teusday of May forever vizt Nine Trustees of ye Freeholders & Commonallity of ye Towne of Huntingtonn one Clerke one Constable & two assessors in such Publique Place as ye Trustees for ye time being shall appoint & Direct & y^t ye Trustees Constables & Assessors be Chosen by ye Majority of voices of the Freeholders & Fremen of ye Towne of Huntington afforesd & whereas there is an act of ye Generall Assemble of this Province Entituled An Act for Defraying of ye Publique & Necessary Charge of each Respective Citty Towne & County throughout this Province &c^a wherein amongst other things it was enacted & provided y^t anually & once every yeare there should be Elected a Certaine Number out of each Respective Citty Towne & county throughout this Province to be Elected & Chosen by ye Major Part of all ye Freeholders & freemen which Certaine Number soe Duely Elected should have full Power & authority to make a assessment or Certaine Rate within there Respective Cittyes Towne & Countys Annually & once every yeare which assessment & Certaine Rate soe Established as afores'd should be paid unto a Certaine
40 Treasurer who should be chosen by ye Major Part of all ye Freeholders & freemen of each Respective Citty Towne & County as afforesd & whereas ye said Towne of Huntingtonn is to be Regulated in ye Premises According to ye Tennure & effect of ye afforecited Act of Assembly Now Know Yee Likewise yt I have Given & Granted & by these prsents Doe Give & Grant for & on behalfe of his said Majesty his Heirs & Successors unto ye sd Trustees of ye Freeholders & Commonality of ye Towne of Huntingtonn & their Successors forever yt ye said Trustees for the time being forever shall be Commissioners of ye said Towne to Execute & Officiate in ye sd office to all intents Construccons & Purposes whatsoever & Further yt sd Trustees as Commissioners of ye sd Towne shall have Power from time to time & at all times hereafter & by such wayes & Meanes to Leavy & Impose such Sume & Summes of Money as they shall think fitt for ye Defraying ye Necessary & Publique Charge of ye said Towne & for ye more orderly Doeing thereof they shall & may from time to time Give such Directions unto ye Assessors Yearly to be chosen for the sd Towne how & after yt manner to proceed in their assessmts for such Sumes of Money as afforesd on ye Estate of Each of ye Respective inhabitants & freeholders of ye sd Towne & ye sd Sumes when soe raised & unto ye hands of ye Treasurer of ye sd Towne as aforesaid to Order ye Payment Disbursement & Disposnall of to such Persons & to & for ye uses aforesd in such manner as to them shall Seeme Convenient and fur-
41 ther yt all & Singuler ye Acts & Orders of ye sd Trustees in ye Premisses shall be Certified under ye said Comon Seale Signed by ye President of ye said Trustees for ye time being who is allwayes first to be Chosen of ye sd Trustees) or in his absence by any other two of ye sd Trustees of sch ye Treasurer & ye assessors of ye sd Towne for ye time being & all other Persons are to take Due Notice & Lastly I Give & Grant for an on behalfe of his sd Majesty his Heires & Successors by thes presents to all & every Per-

son & Persons & to whatsoever Person Subject to his said Majesty his Heirs & Successors free & Lawfull Power and Ability & authority that they or any of them any Messuages Tenements Lands Meadows feedings and Pastures woods underwoods Rents Reversions Services and other Hereditaments whatsoever wch they hold of his sd Majestie his Heirs & Successors unto ye affoesd Trustees of ye Freeholders & Commonallity of ye Towne of Huntingtonn & their Successors shall & May Give Grant Bargaine Sell Allienate To have & to hold & enjoy unto ye sd Trustees of ye Freeholders & Commonallity of ye Towne of Huntingtonn & their Successors forever Yielding & Paying therefore unto his sd Majesty his Heirs & Successors on ye sd five & twentyeth Day of March Yearly & every Year forever ye full & just Sume of Twenty Shillings Currt Money at New Yorke wherefore by vertue of ye Power & authority aforesd I Doe Will & Command for & on behalfe of his sd Majesty his Heirs & Successors yt ye afforesd Trustees of ye Freeholders & Commonallity of ye Towne of Huntingtonn and their Successors have hold
42 use & injoy all ye Libertyes Authoritys Customes Orders Ordinances Franchize Acquittances Lands Tenements & Hereditaments Goods & Chattls afforesd according to ye Tenoure & Effect of thess prents without ye Lett or Hinderance of any Person or Persons whatsoever. In testimony whereof I have Signed these prsents with my Hand Writeing Caused ye same to be Recorded in ye Secretarys Office & ye Seale of this his Majesty Province to be thereunto affixed this Second day of August in ye fourth Yeare of his Majestye Reigne & in ye yeare of Lord one thousand Six hundred & Eighty & Eight.

May itt please yor Excellency The Attourney Generall has Perused this Grant & finds nothing therein Contained Prejudiciall to his Majesty Intrest

W. NICOLLS

Examined August ye
1688

ATt a Councill Held att ffort James in New Yorke August ye 2d 1688

Present
His Excellency ye Governour
Major Antho: Brockholls
Major Gervis Baxter
Major Fred: Phillips
Major S. V. Cortlands

This Pattent was approved of

GEO: BREWERTON

43 I do hereby certify the foregoing to be a true copy of the original record, the words *At a Coun*, 25th line, page 368, being obliterated, as in said record.

Compared therewith by me.

LEWIS A. SCOTT, *Secretary*.

STATE OF NEW YORK, } ss:
*Office of the Secretary of State,* }

I have compared the preceding copy of letters patent with the record thereof in this office, in Book Number 6 of Patents, at page 338, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary of
[L. S.] state, at the city of Albany, the fourth day of November, one thousand eight hundred and eighty-nine.

DIEDRICH WILLERS,
*Dep. Secretary of State.*

Mr. STREET: I offer the following document in evidence:
Patent by Colonial Governor Benjamin Fletcher to the town of Huntington, dated 1694.

Same objection, ruling, and exception.
The purport of the document is stated to the jury.
Marked Plaintiff's Exhibit No. 3.

44 (1694 OCT. 5)

William & Mary by the Grace of God of England Scotland ffrance and Ired King and Queen Defenders of the faith &c[a] To all to whome these Presents shall come send Greeting

Whereas Richard Nicolls Esqr. Late Govr Generall of our Province of New York and Territories Depending thereon in America did by a Certain Deed or Pattent Sealed with his Seale bearing Date the thirtieth day of November in the Eighteenth Year of the Reigne of our Royall Ancestor Charles the Second King of Engl &c[a] and in the Yeare of our Lord God 1666 Grant Ratifye & Confirme unto Jonas Wood Wm. Loveridge Robert Seeley John Ketcham Thomas Sendamore Isaac Platt Thomas Jones & Thomas Weekes as Patentees in behalf of themselves and their Associates the freeholders and Inhabitants of the Town of Huntingtown their Heires Successors and assignes all the Lands that already have been or hereafter shall be Purchased for or on the behalfe of the syd Town of Huntington whether from the Native Proprietors or others within the Limmits and Bounds herein Exprest (that is to say) ffrom a Certain River or Creeke on the West Commonly called by the Indians by the Name of Nackaquatack & by the English the Cold Spring to Stretch Eastward to Nosaquack River on the North to by Bounded by the South Runing betwixt Long Island & the Maine & on the South by the Sea Includeing there nine Severall Necks of Meadow Ground all which Tract of Land together with the sayd Nine Necks thereunto
belonging within the Bounds and Limits aforesayd & all or
45 any Plantations thereupon are to belong to the sayd Town of Huntington as also all Havens Harbours Creeks Quarries Woodland Meadows Pastures Marshes Waters Lakes fishing hawking hunting & fowleing & all other Proffitts Commodityes Emoluments & Hereditaments to the sayd Land Premisses within the

Limits & Bounds aforementioned Described belonging or in any ways Appertaining to have and to hold all & Singular the sayd Lands & Necks of Land Hereditaments and Premisses with their and every of their Appurtenances & of every Part and Parcell thereof to the sayd Patentees & their Associates their Heires Successors & Assignes forever and did likewise thereby Confirme & Grante unto the sayd Patentees and their Associates their Heires Successors and Assignes all the Priviledges belonging to any Town within our sayd Governmt and that the place of their Present Habitation shall Continue & Retain the Name of Huntingtown by which Name it shall be Distinguished and know in all Bargaines & Sales Deeds Records & Writeings they the sayd Patentees and their Associates their heires Successors & Assignes Rendering and Paying such Dutys & Acknowledgments as now are or hereafter shall be constituted and Establisht by the Laws of our Colony &c$^{a}$ as by the sayd Pattent Entered and Recorded in our Secrys Office of our sayd Province Relation being thereunto had may more fully and at Large Appear And whereas our Loveing Subjects Joseph Bayly Thomas Wickes Jonas Wood John Wood John Wickes Thomas Brush and John Adams in behalf of themselves and the Rest of our Loveing Subjects the freeholders & Inhabitants of our sayd Town of Huntingtone Have by Petition Presented unto Benjamin ffletcher our
46 Captain Generall & Governour in Chief of our sayd Province of New York & Terrytories Depending thereon in America Prayed our Grant and Confirmation of the Premisses so only as that the Limits & Bounds of the sayd Towne of Huntingtone shall not be as above mentioned but as hereafter Expressed (that is to say) all those Tracts & Necks of Land Lying upon Long Isl or our Island of Nassau within our County of Suffolk being Bounded on the West by a River Called & Knowne by the Name of Cold Spring a Lyne runing South from the Head of the sayd Cold Spring to the South Sea & on the North by the Sound that Runs between our sayd Isl of Nassaw and the maine Continent & on the East by a Lyne Runing from the West syde of a Pond called & knowne by the Name of the fresh Pond to the West syde of Whitmans Dale or Hollow & from thence to a River on the south syde of our sayd Island of Nassaw on the East syde of a Neck Called Sumpawwawins and from the sayd River Runing South to sayd South Sea and likewise that Wee would be Graciously Pleased to make Erect and Establish all our Loveing Subjects the Inhabitants and freeholders of our sayd Town of Huntingtone within the Limmits & Bounds next above Expressed into one Body Politieque & Corporate in Deed and Name which Reasinable Request wee being Willing to Grant Now Know Yee that of our Especiall Grace Certain Knowledge and meer Motion Wee have Given Granted Ratifyed and Confirmed and by these presents do for us our Heires and Successors Give Grant Ratify & Confirm unto the sayd Joseph Bayly Thomas Wickes Jonas Wood John
47 Wood John Wickes Thomas Brush & John Adams ffreeholders & Inhabitants of our sayd Town of Huntington hereby Erected and made one Body Politick and Corporate and willed and Determined to be called by the Named of the Trustees of the free-

holders & Commonalty of our sayd Town of Huntington & their Successors all the aforecited Tracts and Necks of Land Lying upon our sayd Island of Nassaw within our sayd County of Suffolk Bounded on the West by a River Called & known by the Name of Cold Spring a Lyne Runing South from the Head of the sayd Cold Spring to the South Sea & on the North by the Sound that Runns between our sayd Isld of Nassaw and the maine Continent & on the East by a Lyne Runing from the West syde of a Pond called & known be the Name of fresh Pond to the West syde of Whitmans Dale or Hollow and from thence to a River on the South syde of our sayd Island of Nassaw on the East syde of a Neck called Sumpawwawins and from the sayd River Runing South to the sayd South Sea Togither with all and Singular the Houses Messuages Tenements Buildings Mills Mill damms fenceing Inclosures Gardens Orchards fields Pastures Feedings Woods Underwoods Trees Timber Comon of Pasture Meadows Marshes Swamps Plaines Rivers Rivoletts Waters Lakes Ponds Brooks Streams Beaches Quarries Creeks Harbors Highways & Easements fishing fowleing hunting and hawking Mines Mineralls (Silver and Gold Mines Excepted) & all other franchises Profits benefits Comoditys & Hereditaments whatsoever to the sayd Tract of Land within the Limits and Bounds next above mentioned belonging or in any ways
48 appertaining or there with all used Accepted Reputed or taken to belong or in any ways Appertaine to all intents and Purposes and Constructions w'tsoever and also all & Singular the Rents Arrearages of Rents Issues and Profits of the sayd Tract of Land & Premisses heretofore due and Payable To have & to hold all & Singular the before recited Tracts and Necks of Land & Premisses within the Limmits & Bounds next above mentioned with their & every of their Appurtenances unto the sayd Joseph Bayly Thomas Wickes Jonas Wood John Wood John Wickes Thomas Brush & John Adams Trustees of the Freeholders & Commonalty of our sayd Town of Huntington and their Successors forever with the sole Lycence of Purchaseing from the Natives any Land or Meadow within the Limits & Bounds next aforementioned to & for the Severall & Respective uses following and to no other uses Intents & Purposes whatsoever (that is to say) as for and Concerning all & Singular the Severall and Respective Parcells of Land & Meadow Part of the Granted Premisses in any ways taken up and Appropriated by Perticuler Divisions & Allotments before the Day of the Date hereof unto the Severall and Respective present ffreeholders & Inhabitants of our sayd Town of Huntington by Virtue of the before recited Deed or Pattent to the only use benefit & behoof of the sayd ffreholders or Inhabitants Respectively & to their Severall and Respective Heirs and Assigns forever & as for and concerning all & every such Parcell or Parcells Tract or Tracts Neck or Necks of Land Remainder of the Granted
49 Premisses not taken up or Appropriated to any Perticuler Person or Persons by Virtue of the before recited Deed or Pattent to the use and behoof of the prsent ffreeholders & Inhabitants their Heires Successors & Assignes forever in Propertion to

their Severall and Respective Settlements Divisions and Allotments as Tennants in Common without any manner of Lett Hinderance or Molestation to be had or Reserved upon Pretence of Joynt Tenancy or Survivorship anything herein Conteined to the Contrary in anywise notwithstanding To be holden of us our Heires and Successors in free and Common Soccage according to the Tenure of our Mannour of East Greenwich in our County of Kent within our Realm of England Yeilding Rendring and Paying therefore Yearly and every Year forever unto us our Heires and Successors the Annuall or Yearly Rent of one Lamb or five Shillings Currant Mony of our sayd Province at our Citty of New York upon the feast Day of the Annunciation of our Blessed Virgin Mary in Liew & Stead of all other Rents Dues Dutys Services & Demands whatsoever for the sayd Tract of Land and Premisses And moreover Know Yee that of our Especiall Grace Certain Knowledg & meer motion Wee have willed Determined declared made and Granted and by these prsentd do for us our Heires & Successors Will Determine Declare make & Grant that the sayd ffreeholders & Inhabitants the freemen of our Town of Huntington aforesayd Commonly called by the Name of the freeholders & Inhabitants of our sayd Town of Huntingtone or by whatsoever Name or Names they are Called
50 or named and their Heires and Successors forever henceforward shall be one Body Corporate and Politicque in Deed and Name by the Name of the trustees of the freeholders & Commonalty of the Town of Huntington & then by the name of the trustees of the freeholders & Commonalty of the Town of Huntington one Body Corporate and Polliticque in deed & Name wee have Really and fully made Erected Declared Constituted & Ordained and by these Presents do for us our Heires & Successors Really and fully make Erect Declare Constitute and Ordaine that by the same Name of the freeholders & Commonalty of the Town of Huntingtone they have Succession forever and that they & their Successors by the Name of the Trustees of the freeholders & Commonalty of the Town of Huntington be and shall be forever in future times persons able & Capable in the Law to have Perceive Receive Possesse not only all and Singular the Premisses but other Messuages Lands Tenements Priviledges Jurisdictions franchises and Hereditaments of wtsoever kind or Species they shall be to them and their Successors in fee forever or for the Term of a Year or Years or otherwise of wtsoever manner it be and also Goods Chattells and all other things of wtsoever name nature Quality or Species they shall be and also to Give Grant Release Alien Assign and dispose of Lands Tenemts and Hereditaments and all and every other thing & things Act and Acts to do & Execute by the Name aforesayd and that by the same Name of the trustees of the freeholders & Commonalty of the
51 Town of Huntingtone to Plead and be Impleaded Answer & be Answered unto Defend and be defended they are and may be Capal in whatsoever Place & Places and before whatsoever Judges or Justices or other Persons Officialls of us our Heires and Successors in all & all manner of Actions Plaints Suites Complaints Causes Matters and Demands whatsoever of wt kind quality and Species

the same be in manner & form as any other our Leidge People within our said Province can or are able to have Require Receive Possesse Enjoy Retaine Give Grant Release Alien Assigne and Dispose Plead and be Impleaded Answer and be Answered unto Defend and be defended do permit & Execute and for the better enabling the Trustees of the freeholders & Commonalty of our sayd Town of Huntington in doing and Executing all and Singular the Premisses Wee have Willed Granted and Determined and by these Presents Do for us our Heires & Successors will Grant and Determine that from henceforward and forever hereafter the sayd trustees of the freeholders & Commonalty of the Town of Huntington do and may have and use a Common Seal which shall serve to Execute the causes and affaires whatsoever of them and their Successors And Moreover Wee have Willed and Granted and by these Presents Do for us our Heires and Successors Will and Grant that henceforward and forever there be and shall be Trustees of the ffreeholders & Commonalty of the said Town of Huntingtone to be Chosen & Elected as in these Presents hereafter is mentioned who shall be and shall be Called the Trustees of the freeholders and Commonalty of the Town of Huntington and they & their Successors shall and may at all Convenient times hereafter upon a Publick
Summons from any three of the Trustees aforesaid for the time
52 being Assemble and meete together in the Town House of
the sayd Town or in such Publick Place as shall be from time to time Appointed to make such Acts and Orders in Writeing for the more Orderly doing of the Premisses as they the sayd Trustees of the freeholders and Commonalty of our sayd Town of Huntington & their successors from time to time shall & may think Convenient so always as the sayd Acts and Orders be in no ways Repugnant to the Laws of our Kingdom of England and of this our prvince which now are or hereafter shall be Established and that they be not in any ways Against the true Intent & meaning of these Presents and wee further will and determine that all & Singular the aforesayd Acts and Orders from time to time shall be made and Ordained by the Vote of the Major Part of the sayd Trustees of the freeholders & Commonalty of the sayd Town of Huntington or at Least by the Major pt of such of them as shall from time to time Assemble and Meete together in manner as aforesayd so always as they be not fewer in number than five of the trustees Present at such meetings so to be holden as aforesayd and for the better Execution of this our Grante in this behalf We have Assigned Nominated Created Constituted and made Joseph Bayly Thomas Wickes Jonas Wood John Wood John Wickes Thomas Brush and John Adams to be the first Modern trustees of thef ffreeholders & Commonalty of the Town of Huntington to Continue in the aforesayd Office from and after the Date of these Present untill the time that others be Elected and Chosen in their Stead According to the manner & forme hereafter expressed and moreover Wee do by these Presents for us our Heires and Successors Grant & Appoint that the Trustees of the
freeholders & Commonalty of the Town of Huntington afore-
53 sayd and the Town Clerk of the sayd Town be Yearly Elected

and Chosen on the first Tuesday of May forever (that is to say) Seaven Trustees of the freeholders and Commonalty of the Town of Huntington one Town Clerk one Constable and two Assessors in such Publick Place as the Trustees for the time being shall appoint and direct and that the Trustees Constables Town Clerk and Assessors be Chosen by the Majority of Votes of the freeholders and freemen of our sayd Town of Huntington and whereas by an Act of Generall Assembly of our sayd Province intituled an Act for the Defraying the Publick & Necessary Charge of each Respective Citty Town &c$^{a}$: Amongst other things it is enacted and Provided that annually and once every Year there should be elected a Certain Number out of each Respective Town &c$^{a}$ by the Major part of all the freeholders and freemen of each Respective Town &c$^{a}$ which Certain number so duely Elected should have full Power and Authority to make an Assessment or Certaine Rate within their Respective Towns &c$^{a}$: which Certaine Rate Soe Established as aforesayd should be payd unto a Certaine Treasurer who should likewise be Chosen by the Major Part of all the ffreeholders and freemen of each Respective Town &c$^{a}$: And whereas our sayd Town of Huntington is to be Regulated Accordingly Know Yee further that wee have likewise Given & Granted & by these Presents do for us our Heires & Successors Give and Grant unto the sayd Trustees of the freeholders and Commonalty of the Town of Huntington & to their
Successors forever that the sayd Trustees for the time being shall
54 forever be the Commissioners of the sayd Town to Execute and Officiate in the sayd Office to all intents Constructions and Purposes wtsoever and the sayd Trustees for the time being as Commissioners of the sayd Town shall have Power from time to time and at all times hereafter & by such wayes & Meanes to Levy and Impose such Summe or Summes of Mony as they shall think fitt for the defraying the Necessary and Publick Charge of our sayd Town and for the more Orderly doing thereof they shall and may from time to time Give such Directions unto the Assessors Yearly to be Chosen for our sayd Town how and after wt manner to proceed in their Assessments of such Sumes of Mony as aforeaayed on the Estates of each of the Respective Inhabitants and freeholders of our sayd Town and the sayd Sumes of Money when so raised & payd unto the Hands of the Treasurer of our sayd Town as aforesayd to Orde the Payment Disbursmt and disposall thereof to such prsons and to & for the uses aforesayd in such manner as to them shall seem Convenient and that all & Singular the Acts and Orders of the sayd Trustees for the time being in the Premisses shall be Certifyed under the sayd Common Seale Signed by the President of the said Trustees for the time being (who is always first to be chosen of the sayd Trustees) or in his absence by any other two of the sayd Trustees for the time being of which the treasurer and Assessors of our sayd Town for the time being and all other Persons are to take Due notice and further Wee have also Given
& Granted and by these presents Do for us our Heires and
55 Successors Give and Grante to all & every Person & Persons and to whatsoever person Subject to us our Heires & Succes-

sors free and Lawfull Power and Ability and authority that they or any of them any Messuages Tenements Lands Meadows feedings Pastures Woods Underwood Rents Reversions Services and other hereditamts whatsoever which they hold of us our Heires and Successrs unto the aforesayd Trustees of the freeholders & Comonalty of our sayd Town of Huntington and their Successors shall and may Give Grant Bargain Sell Alienate To have hold and enjoy unto the sayd Trustees of the freeholders & Commonalty of our sayd Town of Huntington and their Successors forever Yielding Rendring and Paying therefore Yearly and every Yeare forever on the feast day of the Annunciation of our Blessed Virgin Mary at our Citty of New York unto us our Heires and Successors the Yearly Rent of forty Shillings Currant Mony of our sayd Province In Testimony whereof wee have caused the Great Seale of our sayd Province to be hereunto affixed Witnesse Benjamin ffletcher our Captain Generall and Governor in Chief of our Province of New York Province of Pensilvania Country of New Castle and the Territories and Tracts of Land Depending thereon in America and Vice Admirall of the same our Lieut. and Commander in Chief of the Millitia and of all the forces by Sea and Land within our Collony of Connecticut & of all the forts and Places of Strength within the same in Council the fifth day of October in the Sixth year of our Reigne Annoq Domi 1694.

By his Excellencys Command

BEN: FLETCHER.

56 DAVID JAMISON *D: Secry.*

I do hereby certify the aforegoing to be a true copy of the original record—the word *feedings*, thirty-first line of page five hundred and six, written on a razure—compared therewith by me.

LEWIS A. SCOTT, *Secretary.*

STATE OF NEW YORK, } *ss:*
*Office of the Secretary of State,* }

I have compared the preceding copy of letters patent with the record thereof in this office, in Book Number 6 of Patents, at page 493, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary of
[L. S.] state, at the city of Albany, the fourth day of November, one thousand eight hundred and eighty-nine.

DIEDRICH WILLERS,
*Dep. Secretary of State.*

Mr. STREET: We offer now the patent by Richard Nichols, colonial governor, to George Baldwin. It is dated June 22nd, 1667.
57 This is a certified copy under the seal of the State (offered for purpose of showing recognition of surrounding boundaries).

The same objection, ruling, and exception.
The purport of the document is stated to the jury.
Marked Plaintiff's Exhibit No. 4.

*Grant to Baldwin of Eaton's Neck* 1667 *June* 22.

A Confirmation of Eatons Neck Graunted unto Geo. Baldwin.

Richard Nicolls Esqr. Governour Genall. under his Royall Highnesse James Duke of Yorke and Albany &c. of all his Territoryes in America To all to whom these pnts Shall come Sendeth Greeting Whereas Mr. William Joanes of New Haven deriving a Right and Title from Theophilus Eaton of the same Place Esqr did upon the 22th day of December 1662 for the Consideracan therein Exprest Bargaine Sell Assigne and Sett over unto Capt Robert Seely of Huntington a Certaine Parcell or Neck of Land Comonly called Eatons Neck lying and being in the East Riding of Yorkshire upon Long Island on the North side of the said Island to the East of Huntington Bay where striking out into the Sound it is thereby bounded to the North East and South and on ye West with Huntington Harbour from whence it goes on East to the Beach which divides it from Crabb Meadows the middle of wch said Beach is the Bounds betwixt the said Neck and Crabb Meadows which also Joynes it
to the Island The Neck of Land aforesd Conteining by Es-
58 timacon about one thousand five hundred Acres bee it more
or less And whereas the said Robert Seely did, by Bill of Sale Bearing date the 29th Day of July 1663 Sell and make over all his Right & *Title* in the said Parcell or Neck of Land commonly called Eatons Neck as aforesaid unto George Baldwin of Huntington aforesaid who hath secured to pay a valuable Consideration for the Same unto the said Robt Seely or his assignes And the said Robt Seely having likewise Cleared his Right and Title to the pr-misses at Law Now for a Confirmacon unto the said George Baldwin in his Enjoyment of his Bargaine for the premisses Know Yee That by vertue of the Commission Authority unto mee given by his Royall Highness I have Ratified Confirmed and Graunted And by these presents do Ratify Confirm and Graunt unto the said George Baldwin his Heires and Assignes the afore recited Parcell or Neck of Land called and knowne by the name of Eatons Neck as aforesaid Together with all the Lands Woods Meadows Pastures Marshes Creeks Waters Lakes ffishing Hunting and ffowling and all other proffitts Commodities and Emolumts to the said Parcell or Neck of Land & prmisses belonging or in any wise Appertaining To have and to hold the said Parcell or Neck of Land and Premisses unto the said George Baldwin his Heires and Assignes unto the proper use and behoofe of the said George Baldwin his Heires and Assignes forever Rendring and Paying such Dutyes and Acknowledgments as now are or hereafter shall bee constituted and Establisht by the
Lawes of this Government under the obedience of his Royall
59 Highnesse his heirs and Successors Given under my hand
and Seale at ffort James n New Yorke the 22d day of June in the 19th Years of his Maties Raigne Annoq Dni 1667.

RICHARD NICOLLS.

I do hereby certify the aforegoing to be a true copy of the orig-

inal record, part of the word premisses, in the thirty-third line, being written on a razure. Compared therewith by me.

LEWIS A. SCOTT, *Secretary.*

STATE OF NEW YORK, } ss.:
*Office of the Secretary of State,* }

I have compared the preceding copy of letters patent with the record thereof in this office, in Book Number One of Patents, at page 89, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, the 21 day of June, one thousand eight hundred and eighty-two.

[L. S.]

AMON S. WOOD,
*Deputy Secretary of State.*

60 The COURT: Do I understand that you have a coast survey map of Huntington Harbor on which is laid down definitely Huntington Bay?

Mr. KEOGH: Yes, sir.

Mr. STREET: We offer a conveyance by George Baldwin to Alexander Brian and his son, Richard Brian, dated July 11th, 1668, conveying Eaton's Neck.

The same objection, ruling, and exception.

The purport of the document is stated to the jury.

Marked Plaintiff's Exhibit No. 5.

*Bill of Sale of Eaton's Neck.*

A bill of sale from George Baldwin and Mary his wife to Alexander Bryan and to his son Richard Bryan.

Known all men by these presents that I, George Baldwine of Hontington on Long Island with the consent of my wife Mary Baldwine, hath demised, granted bargained, sould and made over unto Alexander Bryan and his Sonn Richard Bryan both of Milford in the Colony of Connecticut Marchants, a Certaine proell, or neck of Land comonly Called and known by the name of Easton Neck lying on the East side of Hontington Harbour bounded as is Specified in the patent graunted for that Neck of Land by Richard Nicolls Esqr. Governr of New Yorke, unto the said George Baldwine as also that doth appeare by a bill of Sale of Capn Robert Seely, made over, unto the aforesaid George Baldwine, of Huntington to him, and his
61 heires and Assignes for ever, bearing date the twenty ninth day of July 1663 with all the appurtenances, priviledges profitts and Commodityes, or what else is Specified, particularly in the Patent I the aforesaid George Baldwine doe by these prsents, grant, bargaine, sell and make over unto the aforesaid Alexander and Richard Bryan, to them their heires and Assignes for ever, all that Neck of Land Commonly Called and known by y name of Easton Neck with all dwelling house, barns out houses Lands woods meadows pastures marshes Creaks, waters lakes fishing hunting & fowling and all other profits commodityes and all appurtenances thereunto

belonging For and in Consideration of two húndred poúnds in hand paid by the aforesaid Alexander and Richard Bryan, unto the aforesaid George Baldwine; And I doe by these prsents promise and Ingage unto the aforesaid Alexander and Richard Bryan that I finish the building of the barnes, that is to be done by agreement and likewise to leave there those planks that are in the barne; and further I doe promise and ingage to Secure and deliver every prticular in as good Condition the first of may next ensuing as is att this present Sealing and deliveringe, the aforesaid George Baldwine for himselfe his wife his heires and Assignes doth Covenant and Graunt for him self and eyther of them to and with the abouesaid Alexander and Richard Bryan, their heires and Executors and Assigns, by these presents shall and Lawfully may well and in peace have hold and Enjoy, the aforesaid neck of Land and Appurtenances thereunto belonging and unto the proper use
62 and behoofe of their heires and Assignes for ever; and for the performance of the Conditions I have hereunto Sett my hand and Seale this 11 day of July 1668.

The mark of
GEORGE BALDWIN.
The marke of
MARY BALDWIN.

Signed, sealed, & delivered in the presence of us.
THOMAS OVIAT.
SAMUEL BALDWIN.

STATE OF NEW YORK, } ss:
*Office of the Secretary of State,* }

I have compared the preceding copy of bill of sale with the record thereof in this office, in Book Number Three of Deeds, at page 114, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, the 21 day of June, one thousand eight hundred and eighty-two.

AMON S. WOOD,
[L. S.] *Deputy Secretary of State.*

Mr. STREET: We offer in evidence a grant by the King of England, Charles II, to the Duke of York, dated 1664.

63 Mr. KEOGH: Do I understand that the stenographer is taking down the statements made by counsel of what he understands the effect of these documents to be?

The COURT: The stenographer is taking down what is said. It will be very easy to distinguish what is testimony and what are merely the statements of the counsel.

Mr. KEOGH: I object to the statement of Mr. Street going on the record as in any sense construing the royal patent.

Mr. STREET: We wouldn't offer it unless we supposed it to cover the premises in question.

The COURT: The mere fact that the stenographer takes down these statements does not make them evidence.

Mr. KEOGH: We take the same objection and I assume that there will be the same ruling and our exception will be noted.

Mr. STREET: What we now offer is contained is "New York colonial manuscript, Holland document X," at pages 295, 296, and 297. Said document is Plaintiff's Exhibit 6.

*Grant Charles II, to Duke of York.*

Grant of New Netherlands etc., to the Duke of York.

(New York Book of Patents 1, 109 in office of Secretary of State, Albany.)

Charles the Second by the Grace of God King of England, Scotland, France, and Ireland Defender of the faith &c.

64 To all to whom these presents shall come Greeting.

Know ye that we for divers good causes and Considerations us thereunto moving Have of our Especial Grace, Certain knowledge and mere motion Given and Granted and by these presents for us our heirs and Successors Do Give and Grant unto our Dearest Brother James Duke of York his heirs and Assigns all that part of the maine Land of New England beginning at a certain place called or known by the name of St. Croix next adjoining to New Scotland in America and from thence extending along the sea coast unto a certain place called Petuaquine or Pemaquid and so up the River thereof to the furthest head of the same as it tendeth Northwards and extending from thence to the River Kinebequi and so upwards by the shortest course to the River Canada Northward and also all that Island or Islands commonly called by the several name or names of Matowacks or Long Island situate lying and being towards the West of Cape Cod and the Narrow Higausetts abutting upon the main land between the two rivers then called or known by the several names of Connecticut and Hudsons River together also with the said River called Hudsons River and all the land from the West side of Connecticut to the east side of Delaware Bay and also all those several Islands called or known by the Names of Martins Vinyard and Nantukes otherwise Nantuckett Together with all the Lands, Islands, Soils Rivers Harbors Mines Minerals Quarries Woods Marshes Waters Lakes Fishing Hawking Hunting and Fowling and all other Royalties, Profits, Commodities, and Hereditaments to the said several Islands, Lands and Prenises be-

65 longing and appertaining with their and every of their appurtenances And all our Estate Right Title, Interest, Benefit, Advantage, Claim and Demand of in or to the said Lands and Premises or any part or parcel thereof And the Reversion and Reversions Remainder and Remainders together with the yearly and other the Rents, Revenues and Profits of all and singular the said Premises and of every part and parcel thereof To have and to hold all and singular the said Lands, Islands, Hereditaments and premises with their and every of their appurtenances hereby given and

granted or hereinbefore mentioned to be given and granted unto our Dearest Brother James Duke of York his heirs and Assigns forever To the only proper use and behoof of the said James Duke of York his heirs and Assigns forever To be holden of us our Heirs and Successors as of our Manor of East Greenwich and our County of Kent in free and common soccage and not in Capite nor by Knight service Yielding and rendering. And the said James Duke of York doth for himself his heirs and Assigns covenant and promise to yield and render unto us our Heirs and Successors of and for the same yearly and every year forty Beaver skins when they shall be demanded or within Ninety days after And we do further of our special Grace certain knowledge and mere motion for us our Heirs and Successors Give and Grant unto our said Dearest Brother James Duke of York his Heirs Deputies Agents Commissioners and Assigns by these presents full and absolute power and authority to correct punish, pardon, govern and rule all such the subjects of us Our Heirs and Successors who may from time to time adventure themselves into any the part or places aforesaid or
66 that shall or do at any time hereafter inhabit within the same according to such Laws, Orders, Ordinances, Directions, and Instruments as by our said Dearest Brother or his Assigns shall be established And in defect thereof in cases of necessity According to the good discretions of his Deputies, Commissioners, Officers or Assigns respectively as well in all causes and matters Capital and Criminal as Civil both marine and others So always as the said Statutes Ordinances and proceedings be not contrary to but as near as conveniently may be agreeable to the Laws, Statutes & Government of this Realm of England And saving and reserving to us Our Heirs and Successors the receiving, hearing and determining of the Appeal and Appeals of all or any Person or persons of in or belonging to the territories or Islands aforesaid in or touching any Judgment or Sentence to be there made or given And further that it shall and may be lawful to and for our said Dearest Brother his Heirs and Assigns by these presents from time to time to nominate, make, constitute, ordain and confirm by such name or names stile or stiles as to him or them shall seem good and likewise to revoke, discharge, change and alter as well all and singular Governors, Officers and Ministers which hereafter shall be by him or them thought fit and needful to be made or used within the aforesaid parts and Islands And also to make, ordain and establish all manner of Orders, Laws, directions, instructions forms and Ceremonies of Government and Magistracy fit and necessary for and con-
67 cerning the Government of the territories and Islands aforesaid so always as the same be not contrary to the laws and statutes of this Our Realm of England but as near as may be agreeable thereunto And the same at all times hereafter to put in execution or abrogate revoke or change not only within the precincts of the said Territories or Islands but also upon the Seas in going and coming to and from the same as he or they in their good discretions shall think to be fittest for the good of the Adventurers and Inhabitants there and We do further of Our special Grace, Certain

knowledge and mere motion grant, ordain, and declare that such Governors, Officers and Ministers as from time to time shall be authorized and appointed in manner and form aforesaid shall and may have free power and authority to use and exercise Martial Law in cases of Rebellion, Insurrections and Mutiny in as large and ample manner as Our Lieutenants in Our Counties within our Realm of England have or ought to have by force of their Commission of Lieutenancy or any Law or Statute of this our Realm And we do further by these pre- for us Our Heirs and Successors Grant unto our said Dearest Brother James Duke of York his Heirs and Assigns That it shall and may be lawful to and for the said James Duke of York his heirs and Assigns in his or their discretions from time to time to admit such and so many Person and Persons to trade and traffic unto and within the Territories and Islands aforesaid and into every or any part and parcel thereof and to have possess and enjoy any lands
or hereditaments in the parts and places aforesaid as they shall
68 think fit according to the Laws, Orders, Constitutions and Ordinances by our said Brother his Heirs Deputies, Commissioners and Assigns from time to time to be made and established by virtue of and according to the true intent and meaning of these presents and under such conditions, reservations, and agreements as Our said Brother his Heirs or Assigns shall set down, order, direct and appoint and not otherwise as aforesaid And we do further of Our especial grace, certain knowledge and mere motion for us Our Heirs and Successors give and grant to Our said Dear Brother his Heirs and Assigns by these presents that it shall and may be lawful to and for him, them or any of them at all and every time and times hereafter out of any Our Realms or Dominions whatsoever to take lead, carry and transport in and into their Voyages and for and towards the Plantations of Our said Territories and Islands all such and so many of our Loving subjects or any other strangers being not prohibited or under restraint that will become Our Loving subjects and live under Our Allegiance as shall willingly accompany them in the said voyages together with all such clothing, implements, furniture and other things usually transported and not prohibited as shall be necessary for the inhabitants of the said Islands and Territories and for their use and defence thereof and managing and carrying on the trade with the People there and in passing and returning to and fro.

Yielding and paying to us Our Heirs and Successors the
69 customs and Duties therefore due and payable according to the Laws and customs of this Our Realm And we do also for us Our Heirs and Successors grant to Our said Dearest Brother James Duke of York his Heirs and Assigns and to all and every such Governor or Governors or other Officers or Ministers as by Our said Brother his Heirs or Assigns shall be appointed to have power and authority of Government and command in or over the Inhabitants of the said Territories or Islands that they and every of them shall and lawfully may from time to time and at all times hereafter forever for their several defence and safety encounter, expulse, repel and resist by force of Arms as well by sea as by land and all ways

and means whatsoever all such Person and Persons as without the special License of Our said Dear Brother his Heirs or Assigns shall attempt to inhabit within the several precincts and limits of Our said territories and Islands And also all and every such Person and Persons whatsoever as shall enterprize or attempt at any time hereafter the destruction, invasion, detriment or Annoyance to the parts places or Islands aforesaid or any part thereof And lastly Our will and pleasure is and We do hereby declare and grant that these Our Letters Patent or the enrolment thereof shall be good and effectual in the Law to all intents and purposes whatsoever notwithstanding the not reciting or mentioning of the Premises or any part thereof or the meets or Bounds thereof or of any former or other Letters Patents or Grants heretofore made or granted of the Premises or of any part thereof by us or of any of Our progenitors unto any other Person or Persons whatsoever Bodies Politic or Corporate or any Act, Law or other restraint incertainty or imperfection whatsoever to the Contrary in any wise notwithstanding although express mention of the true yearly value or certainty of the premises or any of them or of any other gifts or grants by Us or by any of Our progenitors or predecessors heretofore made to the said James Duke of York in these presents is not made or any statute, act, ordinance, provision, proclamation or restriction heretofore had, made, enacted, ordained or provided or any other matter cause or thing whatsoever to the Contrary thereof in any wise Notwithstanding.

In Witness whereof We have caused these Our Letters to be made Patents Witness Ourselves at Westminster the twelfth day of March in the Sixteenth Year of Our Reign. (1664.)

By the King.

HOWARD.

Mr. STREET: We now offer a copy, certified by the secretary of state of New York, of the second grant by King Charles II to the Duke of York, dated 1674.

The same objection, ruling, and exception.

The paper marked Plaintiff's Exhibit No. 7.

*Grant Chas. II to Duke of York.* 1674.

His Maties Letters Patents to his Royall Highnesse Recorded November 4th 1674.

Charles the Second by the Grace of God, King of England Scotland, France and Ireland, Defender of the ffaith &c. To all to whom these presents shall come Greeting:

Know yee that wee for divers good causes and considerations Have of our especiall Grace, certaine knowledge and mere motion, Given and granted, and by these presents, for us, our Heirs and Successors Do give and graunt unto our Dearest Brother James Duke of Yorke, his Heires and Assigns, All that part of the Maine Land, of New England, beginning at a certaine place called or

knowne by the name of St. Croix next adjoining to New Scotland in America.; And from thence extending along the Sea-Coast, unto a certaine place called Petuaquine or Pemaquid, and so up the River thereof; to the furthest head of the same, as it tendeth Northwards, and extending from the River of Kinebeque, and so upwards by the shortest course to the River Canada Northwards; And all that Island or Islands, commonly called by the severall name or names of Matowacks or Long Island, Scituate and being towards the west of Cape Cod, and the narrow Highansetts, abutting upon the Maine Land, between the two Rivers there, called or Knowne by the severall names of Conecticutt and Hudsons River together also with the said River called Hudsons River and all the Land from the West side of Conecticutt River, to the
72 East side of Delaware Bay; And also all those severall Islands called or knowne by the names of Martin Vineyard and Nantukes otherwise Nantuckett; Together with all the Lands Islands Soiles, Rivers, Harboes, Mines, Mineralls, Quarryes Woods, Marshaes, Waters, Lakes, ffishings, Hawking, Hunting & ffowling; And all other Royalties proffits commodities and Hereditamts to the said severall Islands, Lands and premisses, belonging and appertaining wth their and every of their Appurtenances and all our Estate Right, Title & Interest, benefit and advantage claime and demand, of, in or to the said Lands or prmises, or any part or parcell thereof; And the Revercon and Revercons, remainder & Remainders together with the yearly and other Rents, Revenues and Proffits of the prmisses and of every part and Parcell thereof; To have and to hold all and singular the said Lands and premisses with their and every of their Appurtenances hereby given and graunted or hereinbefore mentioned—given and graunted unto out said Dearest Brother James Duke of Yorke, his Heirs and Assigns forever; To be holden of us, our Heirs and Successors, as of our Mannor of East Greenwich, in our County of Kent, in free and common Soccage, and not in Capite or by Knight service Yeilding and rendring And the said James Duke of Yorke, for himself his Heirs and Assigns doth Covenant and promise to yield and render unto us, our Heirs and Successors of and for the same consideration yearly and every year, fforty Beaver Skins when they shall be demanded or within ninety days after such demand
73 made; And wee do further, of our speciall grace, certaine knowledge and meer motion, for us our Heirs and Successors Give and graunt unto our said Dearest Brother, James Duke of Yorke, his Heirs, Deputyes, Agents, Commissionrs and Assignes by these prsents full and absolute power and authority to correct, punish, pardon, Govern and Rule all such the Subjects of us our Heirs and Successors or any other Person or pson, as shall from time to time adventure themselves into any of the parts or places aforesaid or that shall or do any time hereafter inhabit within the same according to such Lawes Orders Ordinances, direccons and Instruccons, as by our said Dearest Brother or his Assignes shall be established; And in defect thereof in cases of necessity according the good Direccons of his Deputyes Commissionrs, Officers or Agents respectively, as

well in all cases and matters capitall and criminall as Civil Marine and others so alwayes as the said Statutes, Ordinances and proveings bee not contrary to, but as neare as may bee agreeable to the Lawes, Statutes and Governments of this our Realm of England; And saving and reserving to us, our heirs and Successors the receiving, hearing and determining of the appeal and appeals of all or any pson or psons, of, in or belonging to the Territories or Islands aforesaid, or touching any Judgmt or Sentence to bee there made or given; And further that it shall and may bee Lawfull to and for our said Dearest Brother, his Heirs and Assigns by these prsents from time to time to nominate make, constitute, ordaine and
74 confirme, such Laws as aforesaid by such name or names Stile or Stiles, as to him or them shall seem good; And likewise to revoke, discharge, change and alter as well all and singular, Governors Officers and Ministers which hereafter shall be by him or them thought fit and needfull to bee made or used within the aforesaid Islands and parts; And also to make ordane and established all manner of Lawes, Orders of Government and Magistracy fit and necessary for direccons Instructions forms and ceremonyes, and concerning the Government of the Territoryes and Islands aforesaid so always as the same bee not contrary to the Lawes and Statutes of this our Realme of England, but as near as may be agreeable thereunto and the same at all times hereafter to put in Execution or Abrogate revoke or change not only within the prcincts of the said Territoryes or Islands, but also upon the seas, in going and coming to and from the same, as hee or they in their good discretions shall think fittest for the good of the Adventurers and Inhabitants. And wee do further of our especiall grace certaine Knowledge and meer motion, Graunt Ordaine and Declare, That such Governors Deputyes, Officers and Ministers as from time to time shall be authorized and appointed in manner and forme aforesaid shall and may have full power and Authority within the Territoryes aforesaid to use and exercise Marshal Law, in cases of Rebellion, Insurreccon and mutiny, in as large and ample manner, as our Lieuts in our Countyes, within our Realms of England, have or ought to have by force of their Commission of Lieutenancy or any Law or Statute of this
75 our Realms. And we do further by these presents for us, our Heirs and Successors grant unto our said dearest Brother James Duke of Yorke, his heirs & Assignes That it shall and may be Lawfull to and for the said James Duke of Yorke his Heirs and Assigns in his or their Discrecon from time to time to admit such or so many person or psons to Trade and Trafficke into and wthin ye Territoryes and Islands aforesaid and into and every or any of the Territoryes and Islands afoesaid, & into every or any part and Parcell thereof; And to have possesse and enjoy any Lands and Hereditamts in the ptes and places aforesaid as they shall think fit according to the Laws, Orders Constitutions and ordinances by our said Brother, his Heirs, Deputyes Comrs and Assignes from time to time to bee made & established by vertue of and according to the true intent and meaning of these prsents and under such condicons reservations and Agreemts as our said Dearest Brother his Heirs and As-

signes, shall set downe, order, direct and appoint, and not otherwise as aforesaid; And we do further of our especiall grace, certaine Knowledge & meer motion, for us our Heirs and Successors give and graunt unto our said Deare Brother, his Heires and Assignes by these prsents That it shall and may bee Lawfull to and for him them or any of them, at all and every time and times hereafter out of any of our Realms or Dominions whatsoever, to take lead carry and transport in and into their voyages, for and towards the Plantacons of our said Territoryes, and Islands aforesaid all such and so many of our loving Subjects or any other Strangers,
being not prohibited or under restraint
76 that will become our Loving Subjects and live under our
Alegiance and shall willingly accompany them in the said voyages together with all such cloathing Implemts ffurniture & other things usually transported and not prohibited as shall bee necessary for the inhabitants of the said Islands and Territoryes and for their use and defence thereof and manageing & carrying on the Trade wth the people there, and in passing and returning to and fro Yeilding and paying to us our Heirs and Successors the Customes and Dutyes therefore due and payable according to the Lawes and Customes of this our Realme. And wee do also for us our Heirs, and Successors graunt to our said Dearest Brother, James Duke of Yorke his Heirs and Assignes and to all and such Governor or Governors or Deputies their officers or Ministers as by our said Brother, his Heirs or Assignes shall be appointed to have power and Authority of Governmt or Command, in or over the inhabitants of the set Territoryes or Islands that they or every of them shall and Lawfully may from time to time and at all times forever hereafter for their severall defence & safety, encounter, repulse & expell & resist by force of Armes (as well by the Sea as by Land) and all wayes and means whatsoever, all such pson and psons as without the speciall Licence of our Dearest Brother, his Heirs and Assignes shall attempt to inhabit wthin the severall preincts and Limits of our said Territoryes and Islands And also all and every such pson and psons whatsoever, as shall enterprize and attempt at any time hereafter the Destruccon invasion, detrimt or annoyance to the
77 parts places or Islands aforesaid or any part thereof; And
lastly our will and pleasure is and we do hereby declare & graunt That these our Ltrs patents or ye enrolmt thereof, shall be good and effectual in the Law, to all intents and purposes whatsoever notwithstanding the not well and true reciting or mentioning of the premisses or any part thereof, or the Limits or Bounds thereof, or of any former or other Ltrs. patents or graunts whatsoever made or graunted or of any part thereof by us or any of our progenitors unto any pson or psons whatsoever Bodyes political or Corporate or any Law or other restraint, incertainty or imperfeccon whatsoever to the contrary in any wise notwithstanding Although express mention of the true yearly value or certainty of the prmisses or of any of them or of any other guifts or Graunts by us or by any of our progenitors heretofore made to the said James Duke of Yorke in these prsents is not made or any Statute Act Ordinance provision

proclamation or restriccon heretofore had made enacted or provided or any other matte cause or thing whatsoever to the contrary thereof, in any wise notwithstanding

In Witness whereof wee have caused these our Lres to bee made patents, witness our selfe at westwd the 29th day of June in the 26th yeare of our Reigne.

PIGOTT.

Mr. STREET: We offer an act of the colonial legislature passed in 1691. It is found in the compilation of Livingston and
78 Smith, at page 2. It has the seal of the Territory upon it. We offer the act dated May 6th, 1691, entitled "An act for s-ttling, quieting, and confirming unto the cities, towns, manors, and freeholders under deeds patent of the several grants, patents, and rights respectively.

The same objection, ruling, and exception.

Marked Plaintiff's Exhibit No. 8.

*Colonial Laws.*

(Act of May 6, 1691.)

Chap. II.

An Act for Settling, Quieting and Confirming unto the Cities, Towns, Manors, and Freeholders within this Province their several Grants Patents and Rights respectively.

Pass'd the 6th of May 1691.

Forasmuch as the many changes, Alterations and Disturbances, that have been lately given unto Their Majesties Subjects inhabitating within this Their Province, hath and doth very much discourage the Settling, Improving, and the Growth and Strength thereof; and that it is now absolutely necessary, for the quieting and satisfying Their Majesties good Subjects within the same, that the Rights and Privileges formerly held by, and granted to the respective Cities, Towns, Manors, and Freeholders within this Province, &c. should be now ratified and confirmed:

I. Be it therefore Enacted by the Governor, Council, and Representative convened in General Assembly, and it is hereby
79 Enacted and Declared by the Authority of the same, That all the Charters, Patents and Grants, made given, and granted, and well and truly executed under the Seal of this Province constituted and authorized by their late and present Majesties, the Kings of England, and registred in the Secretary's Office, unto the several and respective Corporations or Bodies Politick of the Cities, Towns, and Manors, and also to the several and respective freeholders within this Province, are and shall forever be deemed, esteemed, and reputed good and effectual Charters, Patents, and Grants authentick in the Law, against their Majesties, Their Heirs, and Successors, forever, notwithstanding of the Want of Form in the Law, or the Non-feizance of any Right, Privilege, or Custom, which ought to have

been done heretofore by the Constitutions and Directions contain'd in the respective Charters, Patents and Grants aforesaid.

II. And be it further Enacted by the Authority aforesaid, That all the Charters, Patents, and Grants made, given, and granted, as aforesaid unto all and every the several and respective Corporations or Bodies Politick of the Cities, Towns, and Manors, and their successors, and also unto all and every the respective Freeholders, their Heirs and Assignes, forever, within this Province, are, to all Intents and Purposes whatsoever, hereby ratified and confirmed, to have, hold, exercise, occupy, possess, and enjoy all their and every of their former Rights, Customs, Prerogatives, Privileges, Preheminencies,
Practices, Immunities Liberties, Franchises, Royalties, and
80 Usages whatsoever, in as full and ample Manner as if none of these Changes, Alterations Disturbances, Want of other Forms in the Law, or the Non-feizance of any Rights Privileges, or Customs of any of the Corporations aforesaid, had never happened, or been neglected; any Thing herein contained, or in any other Law to the contrary in any wise notwithstanding Provided, That nothing herein contained shall be construed or taken, to bar any Person or Persons, of his or their former and just Right or Pretences, to any House, Tract, or Parcel of Land within this Province: Always provided, That he or they that have any such just Right or Pretence, do make his or their Claim within the Space of Five Years next after the Date hereof.

And also provided, That nothing herein contained shall be intended or construed to the Prejudice or Hinderance of the Title or Claim of any Person under age, *Feme Covert, Non Compos Mentis*, Imprisonment, or beyond the Seas. (See Livingston & Smith's Colonial Laws, printed 1752, p. 2 & 3.)

Mr. STREET. I read from the Constitution of the State, sections 35 and 36, as found in the first volume of Jones and Varick, at page 12.

Mr. STREET. We offer to read from the second volume of Jones and Varick's Law of New York, chapter 64, an act for dividing the grounds of this State of New York into towns, dated March 7th, 1788. We offer only the 15th and 16th sections of that chapter.

The same objection, ruling, and exception.

81 Mr. KEOGH. I desire further to object on the ground that the act must be offered in evidence.

The COURT: That is a sound objection.

I understand that counsel for plaintiff calls attention to the fact that in chapter 62 he proposes to read the fifteenth and sixteenth sections as the basis for his argument hereafter, but the whole act will be considered in evidence.

Mr. STREET: This is only offered with reference to the authority of the towns to make regulations.

The document is Plaintiff's Exhibit No. 9.

## Chap. LXI.

An Act for dividing the Counties of this State into Towns Passed 7th March, 1788.

SEC. XV. And be it further Enacted by the Authority aforesaid, That the Freeholders and Inhabitants of each and every of the said Towns shall be, and are hereby authorized and empowered, at their respective annual Town-Meetings, or at any other Town-Meeting held for that purpose in their respective Towns, from Time to Time, to make, establish, constitute and ordain, such prudential Rules, Orders and Regulations, as the Majority of the Freeholders and Inhabitants of such Towns respectively, so assembled at their respective Town-Meetings, and having a Right to vote there, shall from Time to Time judge necessary and convenient, for the better improving of their common Lands in Tillage, Pasturage or any other
82 reasonable Way; and for making, maintaining and amending their partition and circular Fences, for their Lands, Gardens, Orchards and Meadows; and for ascertaining and directing ing the use and management, and the Times and Manner of using their common, Lands and Meadows and other Commons, and the Times, Places and Manner of permitting or preventing Cattle, Horses, Sheep and Swine, or any of them, to go at large; and for impounding all manner of Cattle and Creatures whatsoever; and for ascertaining the Sufficiency of all Partition and other Fences; and for making and maintaining such and so many Pounds, and at such places as may be necessary and convenient; and for ascertaining and limiting the Fees to be taken by the Fence-Viewers respectively; and to impose such Penalties on the Offenders against such Rules, Orders and Regulations, or any or either of them as the Majority of such Freeholders and Inhabitants so assembled shall from time to time deem proper, not exceeding Five Pounds for each offence; to be recovered with costs of Suit, by the Supervisor for the Time being of the Town where the offence shall be committed, in the Name of the Supervisor of such Town, for the Use of the same Town, by Action or Debt, before any Justice of the Peace residing in any other Town in the same County. And no such Action shall be abated or discontinued by the Death or Expiration of the Office of such Supervisor, but may be continued and prosecuted to Effect by his Successors in Office. And all such Penalties, when recovered, shall be applied and disposed of for the Use of the Town where such Offence shall be committed, in such Manner and for
83 such Purposes, as the Freeholders and Inhabitants of the same Town where such Offence shall be committed, at their Town-Meetings, or the Majority of them there assembled, shall, from Time to Time, direct and appoint And further, That all such Rules, Orders and Reglations, so to be made as aforesaid in each Town, shall be entered and recorded by the Town-Clerk of the same Town, in a Book by him to be provided for that Purpose, and shall remain and be in full Force until the same shall be revoked or altered, or new made in the Manner aforesaid, at some subsequent Town-Meet-

ing; all which Alterations and new Rules Orders and Regulations, shall also, from Time to Time, be entered and recorded as aforesaid, and shall continue and be in Force until revoked, altered or new made, as aforesaid.'

SEC. XVI. And be it further Enacted by the Authority aforesaid, That it shall and may be lawful for the Freeholders and Inhabitants of each and every of the said Towns, at their respective annual Town-Meetings, or at any other Town-Meeting held for that Purpose, to make such Provisions and allow such Rewards, for the Destruction of Wolves, Wild Cats, Foxes, Crows, Black-Birds, and other noxious wild Animals and Birds; and to direct such sum of money to be raised in such Town for that Purpose, and for prosecuting or defending the common Rights of such Town, as the Major Part of the said Freeholders and Inhabitants so assembled at any such Town-Meeting shall deem necessary and proper, which Money shall be raised and levied, together with and in the same Manner as
84 the Money raised in such Town for the Support of the Poor, shall be raised and levied.

(Jones & Verick's Laws N. Y., vol. 2, p. 337.)

Mr. STREET: We offer chapter 492 of the Session Laws of 1872, passed May 3rd, 1872.

The same objection, ruling, and exception.
The document is Plaintiff's Exhibit No. 10.

Mr. STREET: We offer chapter 584 of the Laws of 1887, passed June 16th, 1887.

The same objection, ruling, and exception.
The document is Plaintiff's Exhibit No. 11.

Mr. STREET: We offer in evidence chapter 279 of Laws of 1888, passed May 10th, 1888.

The same objection, ruling, and exception.
The document is Plaintiff's Exhibit No. 12.

Mr. STREET: We offer chapter 213 of the Laws of New York of 1880, passed May 8th, 1880.

Same objection, ruling, and exception.
The document is Plaintiff's Exhibit No. 13.

Mr. STREET: We offer now to read from the Laws and Regulations of the Board of Supervisors of Suffolk County resolution No. 4, passed December 15th, 1875.

Mr. KEOGH: I object to this as incompetent, immaterial, and irrelevant. I will state that I do not object on the ground that they have not a certified copy. I do not take any technical objection to the evidence.

Mr. STREET: I offer section No. 1, resolution 4.

85 Marked Plaintiff's Exhibit No. 14.

*Laws Passed by Board Supervisors.*

(1875, Dec. 15.) Resolution No. 4.

An act for the protection of the fisheries within the waters of Suffolk county and their preservation to the exclusive use and enjoyment of the inhabitants of said county by forbidding all persons other than the inhabitants of said county from engaging therein.

The authority to pass this resolution is found in chapter 194 of the Laws of 1849 (sec. 4, subdivision 13) and chapter 482 of the Laws of 1875.

It was passed Dec. 15, 1875, by a vote of two-thirds of all the members elected. The board of supervisors of the county of Suffolk, at a meeting thereof lawfully assembled, at least two-thirds of all the members being present and voting therefor, do enact as follows:

SEC. 1. It shall not be lawful for any person not an inhabitant of the county of Suffolk to take or catch any fish commonly called edible fish or any eels, clams, escallops, or other shellfish within the public waters of said county. Any person who shall violate any provisions of this section shall be liable to a penalty of fifty dollars for each offence.

(See Proceedings Board Supervisors, 1875.)

Mr. ACKERLY: I offer in evidence the following laws: Chapter 432 of the Laws of 1874.

86 The document is Plaintiff's Exhibit No. 15.

Chapter 128 of the Laws of 1883.

The document is Plaintiff's Exhibit No. 16.

Chapter 502 of the Laws of 1875.

The document is Plaintiff's Exhibit No. 17.

To all of the foregoing there is the same objection, ruling, and exception.

Mr. ACKERLY: Then there is another act, chapter 698 of the Laws of 1881.

The same objection, ruling, and exception.

The document is Plaintiff's Exhibit No. 18.

Mr. STREET: Volume No. 1 of town meetings, entitled "Records of the Town of Huntington," at page 206, offered in evidence.

The same objection, ruling, and exception.

The entry is Plaintiff's Exhibit No. 19.

Record town meeting, town of Huntington, vol. 1, p. 206.

At a town meeting on May 7th, 1695, Joseph Bailey, Justus Wickes, John Wood, C. Wickes, John Adams, James Brush, Thomas Wood were chosen trustees for this present year.

Mr. STREET: I will call the town clerk in order to have him identify these books.

PHILIP PEARSAL, a witness for the plaintiff, being duly sworn, testified as follows:

By Mr. STREET:

I am the present town clerk of the town of Huntington. I have held the office nearly three years, but not quite. I
87 have acted as such. I am familiar with the books, records, and papers of the clerk's office. The book you now show me and from which you have just read an entry is a part of the records of my office.

The COURT: Am I to understand generally that Mr. Keogh's objection, so far as competency is concerned, applies to the sufficiency of the proof of these documents?

Mr. KEOGH: No, sir; it does not. I have said so before, your honor.

The COURT: I so understood you before.

Mr. STREET: I now read from the same volume of town records, pages 279 and 280, an entry dated May 3rd, 1757:

"At a general town meeting it was voted that ye freeholders and trustees of ye town should unanimously join together to defend the town from strangers fishing and fowling anywhere in ye town."

The same objection, ruling, and exception.

The entry is Plaintiff's Exhibit No. 20.

Mr. STREET: I read from the same volume, pages 256 and 257, an entry dated May 2nd, 1758:

On the same day voted and agreed that the trustees and freeholders of the town should unanimously join together to defend the town from strangers fishing, fowling, and hunting in the said township and as far as the patents extend.

The same objection, ruling, and exception.

The entry is Plaintiff's Exhibit No. 21.

Mr. KEOGH: It is not necessary that you should have these records further identified by Mr. Pearsall.

88 Mr. STREET: I read the entry from volume 2, page 2, dated April 6th, 1874, as follows:

"At a town meeting, voted that if any person that doth not belong to this township should hunt, hawk, fowl, or fish within this township he be prosecuted for the same and damages recovered before the justice of the peace."

The same objection, ruling, and exception.

The entry is Plaintiff's Exhibit No. 22.

Mr. STREET: I offer from the same volume, at page 13, the entry dated April 5th, 1785, as follows:

"Voted: A town act to prevent foreigners from hunting, fishing, fowling, or hawking within the town of Huntington, passed 5th April, anno Domini 1785.—Whereas the necessities of many inhabitants of our said town require the prevention of foreigners from

hunting, fowling, fishing, or hawking within the same: Be it therefore enacted by the people in the town of Huntington, Suffolk county and State of New York, by virtue of our charter, bearing date the 5th day of October, 1694, that if any foreigner is found hunting, hawking, fishing, or fowling with- the town of Huntington he or they found trespassing within the limits of the aforesaid town shall forfeit the sum of £5 to the people of the town of Huntington, which shall be recovered if not paid before any justice of the peace within said county, with all reasonable charges for the same."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 23.

Mr. STREET: I read from the same volume, at page 15, the
89 entry dated April 4th, 1785:
"Voted and agreed that the South Bay shall be leased out to Josiah Ketcham."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 24.

Mr. STREET: From the same volume, at page 119, I read the entry June 25th, 1793:
"The trustees of the town of Huntington, at their meeting, resolved that any person not an inhabitant shall not carry any clams away out of the said town caught within the limits of the town of Huntington without first having obtained permission as aforesaid under the penalty of £3."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 25.

Mr. STREET: I read from the same volume, at page 160½, the entry dated June 1st, 1795:
"Act passed by trustees of the town of Huntington—Whereas sundry persons are making a practice of taking and carrying away clams and oysters from the harbors on the north side of the town of Huntington, for the prevention of which be it enacted and ordained by the trustees of the freeholders and commonalty of the town of Huntington, and it is hereby enacted and ordained by the authority of the same, that if any person or persons, after the 10th day of June, 1795, shall take and carry away out of any of the harbors of the north side of the township of Huntington any clams or oysters he or they or any of them so offending shall forfeit the sum
90 of 40*s.* for every offense contrary to the true intent and meaning of this act, and shall be prosecuted before any justice of the peace in the county of Suffolk, in which action the plaintiff shall recover his costs; ½ of the penalty so recovered shall belong to the plaintiff and the other half shall belong to the poor of the town of Huntington."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 26.

Mr. STREET: I read from the same volume, at page 184½, the entry dated June 20th, 1796, being an act passed by the trustees of the town of Huntington, and substantially the same as the last that I read, with the difference of the date.

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 27.

Mr. STREET: I read from the same volume, at page 243, the entry dated April 5th, 1803:

"At a town meeting, voted that no person or persons not being an inhabitant of the town of Huntington shall practice fishing, clamming, or oystering in the same town under the penalty of $10 for every offense of that kind, one moiety to the plaintiff."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 28.

Mr. STREET: I read from the same volume, at page 295, the entry dated the first Tuesday of April, 1810:

"At town meeting, resolved that whereas sundry persons from towns not in the county of Suffolk and from other towns, not
91 being entitled to the privilege of fishing in the limits of said town of Huntington, that any person who will catch any such trespasser or trespassers, he shall be brought to justice before any court of record within said county, and shall be entitled to a premium of five dollars, to be paid on a certificate duly certified by any magistrate of the county."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 29.

Mr. STREET: I read from the same volume, page 357, the entry dated April 7th, 1818:

"At a town meeting, voted that no person who is not an inhabitant of the town or of the adjoining towns shall be permitted to catch any clams, fowls, or fish in the jurisdiction of said town, under a penalty of ten dollars for every offense, one moiety to the plaintiff and the other for the use of the town."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 30.

Mr. STREET: I read from the same volume, page 395, the entry dated the first Tuesday of April, 1823:

"At a town meeting, voted that no person who is not a resident of the county of Suffolk be permitted to catch any clams, fish, or horse-feet in the limits and bounds of the town of Huntington, under the penalty of $12.50 for every offence, to be recovered, with costs, in any court having cognizance thereof, one moiety to the plaintiff and the other to the use of the town."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 31.

92 Mr. STREET: I read from the same volume, at page 418, the entry dated the first Tuesday in April, 1828:

"At a town meeting, voted that no person who is not a resident of the county of Suffolk be permitted to catch any clams, fish, or horse-feet within the limits and bounds of the town of Huntington, and that no person be permitted to gun with machines or stools in said town, under the penalty of $12.50 for every offence, to be recovered, with costs, in any court having cognizance thereof."

Same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 32.

Mr. STREET: I read from the same volume, at page 442, the entry dated the first Tuesday of April, 1833:

"At a town meeting, voted and resolved that no person not a resident of the said town be permitted to catch any clams, fish, eels, or horse-feet in the bounds of said town, under the penalty of $12.50."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 33.

Mr. STREET: I read from the same volume, page 473, the entry dated April 3rd, 1838:

"At a town meeting, voted and resolved that no person being a non-resident of the town of Huntington be permitted to catch clams, eels, fish, or horse-feet within the bounds of the said town, under the penalty of $12.50, the inhabitants of the town of Islip excepted."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit 34.

93 Mr. STREET: I will read from volume 3 of the records of town meetings of the town of Huntington, at page 19, the entry dated April 2nd, 1844:

"Resolved, That no person a non-resident of the town of Huntington be permitted to catch oysters, clams, eels, fish, or horse-feet within the bounds of said town, under the penalty of $12.50, the plaintiff to have half and the remainder to the town; the inhabitants of Islip excepted."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 35.

Mr. STREET: I read from the same volume, at page 51, the entry dated April 5th, 1849:

"At a town meeting, resolved that no person being a non-resident of the town of Huntington be permitted to catch oysters, eels, fish, or horse-feet within the bounds of the said town, under the penalty of $12.50, complainant to have half; the inhabitants of Islip excepted."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 36.

Mr. STREET: I read from the same volume, at page 82, the entry dated April 3rd, 1855:

"At a town meeting, resolved that no person being a non-resident of the town of Huntington be permitted to catch oysters, fish, eels, or horse-feet within the bounds of the said town, under the penalty of $12.50, complainant to have half; inhabitants of Islip excepted."

94 "Resolved, That all persons be prohibited from putting down stakes in any of the harbors of the town of Huntington to mark the lines of the oyster beds that will in any way obstruct fishing with nets, under the penalty of $12.50, and also those already put down."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 37.

Mr. STREET: I read from the same volume, at page 94, the entry dated April 7th, 1857:

"At a town meeting, resolved that the trustees of this town be directed to make rules and regulations for the planting of oysters, to receive applications and grant permissions to the inhabitants of this town for planting oysters, and *and* resolved that no person other than a resident of Huntington shall take or catch any oysters, clams, eels, fish, horse-feet, or mussels within the bounds of the said town, under the penalty of $12.50 for each and every offense, the plaintiff to have half of the fine."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 38.

Mr. STREET: I read from the same volume, at page 222, the entry dated April 4th, 1871:

"At a town meeting, resolved that the trustees of this town be authorized, empowered, and directed to lease the lands immediately suitable for oyster beds in the bays and harbors belonging under the waters of the town of Huntington. Before doing so they shal take proper counsel therein as to the best and safest manner

95 of leasing said grounds. None but residents have the privilege to said lease, and those residents having oysters already planted be entitled to the first privilege, and the trustees be required to give public notice for two weeks before adopting the resolution for the terms and manner of leasing."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 39.

Mr. STREET: I now read from volume 4 of the records of town meetings, at page 85, the entry dated April 6th, 1880:

"Also resolved that the trustees of the town of Huntington, in their discretion, assume the prosecution of the suit of Seth Robbins, David Demilt, and Charles P. Soper, but that they do not exceed in the expense incurred the amount of monies paid to said town for oyster leases."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 40.

Mr. STREET: I read from the same volume, at page 90, entry dated April 5th, 1881:

"At town meeting, resolved that the trustees of this town appropriate the rents received from oyster-grant leases and such further sums as they deem necessary from rents of town lands to and for the purpose of having the court of appeals pass upon the question of the town's title to lands under water in the suit of said Robbins against Andrew Ackerly, now awaiting the decision of the general term of the supreme court of this district."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 41.

96 Mr. STREET: I also read from the same volume, page 96, the entry dated March 28th, 1882:

"At a town meeting, resolved that the trustees of this town lease all the ground under water within their jurisdiction fit for oyster-planting purposes, giving parties now occupying the same the preference for 30 days from to-day, and thereafter lease such grounds to any persons, residents of the town, who may apply for the same, in such parcels as they may deem expedient, and that they ratify and confirm all leases that have been made, and that the trustees take such steps as may be necessary to fully vindicate and sustain their title and right in all town property."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 42.

On the application of Wm. Neidlinger a juror, by consent of counsel on both sides, said juror was excused, it being agreed that the case should be tried with eleven jurors sitting.

Mr. STREET: I read from same volume, at page 129, the entry dated April 7th, 1885:

"Town meeting.—Resolved, That the board of trustees lease to applicants land under water in not less than seven feet at low water, in Huntington Bay not less than 500 feet from the shore."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 43.

Mr. STREET: I read from the same volume, page 145, the entry dated September 6th, 1886:

97 "At a meeting of the Board of Trustees of the Town of Huntington, held at the rooms of the board, on Monday, September 6th, 1886, there was present John F. Wood and others. On motion, resolved by unanimous vote that the town clerk send a copy of the following letter to E. G. Blackford in reply to his of the second instant:

"Hon. Eugene E. Blackford, commissioner of fisheries in charge of survey of oyster territory of the State of New York.

DEAR SIR: In reply to your letter of the second instant asking me to send you descriptive list of the lands under water held by the

town of Huntington, I have to say that the board of trustees of the town met this day to consider your communication, and I am directed by the board to answer as follows: The town board of the trustees claim to be invested with title in fee simple in all the lands under tide-water, except such limited parts as have been granted by them for dock and other purposes, in Huntington Harbor, Centreport Harbor, Northport Harbor, Crab Meadow Harbor, Northport Bay, Huntington Bay, within a straight line drawn from the northerly part of Eaton's Neck to the northerly part of Lloyd's Neck; all that part of Cold Spring Harbor or Bay which lies within the boundaries of the bay, and all that part of Lloyd's Harbor southerly and easterly of the old town lines through Lloyd's Harbor before the passage of the act at the last session of the Legislature annexing Lloyd's Neck to Huntington. The line of our title to Cold Spring Harbor or Cold Spring Bay appears by papers and maps in the
98 town clerk's office, and if a more definate statement of the line is required we will gladly furnish you the same. This town claims its title under several grants and charters made to the town by colonial governors."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 44.

Mr. STREET: From the same volume, at page 152, I read the entry, date of April 5th, 1887:

"Resolved, That the board of trustees have a survey made of Huntington Bay and proceed to lease the bottom thereof in pursuance of the resolution at the previous town meeting, providing that the cost of the said survey shall not exceed the sum of $250."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 45.

Mr. STREET: I read from the same volume, page 160, entry under date of November 18th, 1887:

"At a special town meeting.—Pursuant to a call dated November 18th, 1887, there was a special town meeting held Jan. 17th, 1888, at Euterpean Hall, for the purpose of deliberating in regard to the institution of or defence of a suit to finally determine the title of the town to the bottom of Huntington Bay; also that the people might express their wishes as to whether any of said bay shall be leased to non-residents of the town of Huntington. The whole number of votes cast for or against the institution of or defence of a suit, 314; of which there was cast for the institution of or defence of a suit
309; against the institution of or defence of a suit, 5. The
99 whole number of those cast for or against leasing to non-residents was 303, of which there were for leasing to non-residents 9; against leasing to non-residents, 294.

PHILIP PEARSAL, *Clerk.*"

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 46.

Mr. STREET: I now read from a book of records of the proceedings of the Board of Trustees of the Town of Huntington, volume 1, page 35, the entry dated October 1st, 1842.

(Defendant's counsel states that no questions need be asked of the town clerk for the purpose of identifying the books.)

"Resolved by the Trustees of the Town of Huntington, That the practice of dragging in any way or manner for oysters in the waters of this town by any person or persons we hereby prohibit under the penalty of $12.50 for each and every offence."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 47.

Mr. STREET: I read from the same volume, page 132, the entry Feb. 28th, 1859:

"Resolved, That a notice be served on Samuel Pell and Joshua Livinas, non-residents of said town, to desist from staking out any of the lands under water within the bounds of this town as and for oyster beds within the bays or waters of the said town."

"Resolved, That a notice be printed and published."

"Resolved, That Tobias Dillon and Warren Lewis be appointed to serve notice on the oyster planters."

100 "Notice to Samuel Pell, Wilson W. Dillon, Isaac Van Allen, William Dillon, Theodore Lowndes, John Lowndes, Joshua Livinas, and all other non-residents.

"The trustees of the freeholders and the commonalty hereby give you notice that you and each of you do desist from staking out any of the lands under water within the borders of the said town as and for oyster beds or for the purpose of planting oysters thereon, and that you desist also from planting any oysters within the bays, harbors, or waters of said town, and from raking, digging up, or carrying away any oysters now growing or being within the bounds of said town; you, the said persons, are hereby notified, not being inhabitants or residents within the said town of Huntington; and we further notify you that we have a standing by-law of said town that no person other than a resident thereof shall take or catch any oysters within the bounds of said town under the penalty of $12.50 for each and every offence, which penalty shall be strictly enforced.

"By order of the board of trustees:

"GILBERT CARLL, *President.*

"Huntington, February 28th, 1859."

Same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 48.

Mr. STREET: I read from the same volume, page 110, the entry dated August 30th, 1856:

"*Resolution of the Board Trustees.*

"That the board of trustees will grant a lease to William C. Stout, Dr. Capen J. Post, Jr., for twelve years from the 30th day of July,

1856, for the yearly rent of one dollar per year, with the privilege of renewing the said lease twelve years longer, on
101 such terms as may then be agreed on, and that the president, Elbert Waters, John D. Willett, be appointed committee to view the premises and report the bounds to be put in the lease.

"Voted—Gilbert Carll, Elbert Waters, Timothy J. Parry, Zebulon Buffett.

"GILBERT CARLL, *President.*
"JOSEPH STREET, *Clerk.*"

Same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 49.

Mr. STREET: I read now from volume 2 of proceedings of trustees of the town of Huntington, at page 40, the entry March 27th, 1876:

"At a meeting of the Board of Trustees of the Town of Huntington, after due deliberation upon the subject and conferring with Messrs. Weller and Carll, as surveyors, in regard to surveying the said water grants in Northport and Centerport Harbors and Bays, as was the object of this meeting, this was agreed upon between the two above-named gentlemen that they should do the above-named survey."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 50.

Mr. STREET: I read from the same volume, at pages 60 and 61, the entry June 14th, 1879:

"At a meeting of the board of trustees.—Whereas certain applicants for leasing the oyster grounds of the harbors and bays of the town of Huntington have represented to the board of trustees of the town that the term of five years for said leases is too short for practical purposes for the planting and growth of oysters on said
102 ground and in order to render the same profitable as a business:

"Resolved, That leases be granted to applicants for oyster grounds in said bays and harbors for the term of fifteen years from January 1st, 1879, and that said leases be granted and new leases be given to that effect."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 51.

Mr. STREET: I read from the same volume, at page 77, the entry December 8th, 1880:

"*Meeting of the Board of Trustees.*

Resolved, That the president of this board be appointed a committee with power to employ counsel and take necessary action to defend the rights of the town in the matter of the application of Charles H. Jones for a grant of land, under water, at Northport Harbor, now pending before the attorney general at Albany."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 52.

Mr. STREET: I read from the same volume, page 92, the entry September 1st. 1881:

"*Proceedings of the Board of Trustees.*

Whereas several applications have been made to lease lands, under water, adjacent to West Beach for purposes of dredging and screening gravel:

Resolved, That the trustees of the town of Huntington lease the same at public auction, near the premises at West Beach, on
103 the 20th of September, 1881, at 2 o'clock p. m., at which time and place the terms and conditions of said lease will be made known.

"Resolved, That a copy of the above resolution be published in the several newspapers of the town."

Also, on the same page and as part of the same exhibit, the following:

"*Meeting of the Trustees.*

SEPTEMBER 13TH, 1881.

At a meeting of the board of the town of Huntington, at West Beach, in said town, on the 13th day of September, 1881—present, S. C. Rogers, president; Chas. V. Scudder, trustee; Timothy Oakley, Benjamin Doty; D. Conklin, clerk—for the purpose of leasing said West Beach below high-water mark for five years.

The premises were put up at auction and sold to the highest bidder, N. S. Ackerly, for $375 per year, under the following terms of sale, viz:"

The same objection, ruling, and exception.
Tne two entries are Plaintiff's Exhibit No. 53.

Mr. STREET: I also read the following entry, under date of September 13th, 1881, which follows Exhibit 53:

"I have this day purchased the privilege of dredging gravel, as described in the foregoing terms of sale, and hereby agree to comply with all the conditions thereof.

N. S. ACKERLY.

The purchase being $375 a year.
September 13th, 1881.

"Resolved, That the president of the board be, and hereby is, authorized and directed, on behalf of this board and with their
104 direction and consent, hereby given, to execute a lease to N. S. Ackerly of the premises this day struck down to him at public auction, for the term of five years, at a rental of $375 per year."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 54.

Mr. STREET: I read from the same volume, page 95, entry dated November 12th, 1881:

"Resolved, That we appropriate $1,000 to have the court of appeals pass on the question of the title to lands under water, in the suit of Seth R. Robbins against Andrew Ackerly."

Same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 55.

Mr. STREET: From the same volume, page 186, the entry June 17, 1887:

"Resolved, That this board accept the proposal of Mr. Oscar Darling for the survey of Huntington Bay."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 56.

Mr. STREET: From the same volume, page 191, I read the entry July 29th, 1887:

"Resolution of the board of trustees.—Whereas this board has provided for a survey of Huntington Bay within the limits as to cost of the sum specified by the last town meeting, to wit, $250, and it now becomes necessary, in order to define the boundaries and to preserve said survey, that monuments shall be provided and set upon the shore of said bay: Therefore, Resolved, That the president of the board contract with Oscar Darling, civil engineer, to furnsh and set up said monuments of locust, of such sizes as the president may designate, placed at such places as he may direct.

PHILIP PEARSALL.

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 57.

105 Mr. STREET: From the same volume, page 227, I read the entry July 17th, 1888:

"Meeting of the board of trustees.

"On motion, resolved that this board do hereby ratify and confirm the action for us by our counsel in serving notice on occupants of grounds in Huntington Bay in all particulars.

"On motion, resolved that we advise and authorize our president to make complaint, under section 441 of the penal code, against non-residents of this State who have or shall plant oysters in any way of the waters of this town without our consent, it being thought advisable by counsel."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 58.

Mr. STREET: I now propose to read entries from a book of records entitled "Leases and Deeds by Trustees."

Mr. KEOGH: These are objected to on the ground that it does not appear that they are leases of the land in question under Huntington Bay. Former objections are renewed.

Objection overruled. Defendant excepts.

Mr. STREET: I now offer from this book a lease dated the 20th day of July, 1856:

"The trustees of the freeholders and commonalty of the town of Huntington to William C. Stout, Thomas Ward, and J. Post, Jr.

"All that certain piece of land covered with water situated in the said town of Huntington at a place called and known by the
106 name of East Neck, bounded as follows, namely: Beginning at the center of the highway leading from Huntington village to the bay and at East Neck through the estate of Titus Conklin, deceased, from the center of the said highway easterly 40 feet, thence at right angles from the shore or high-water mark into the bay 130 feet; thence westerly parallel with the shore 200 feet; thence at right angles to the shore or ordinary high-water mark —; thence easterly to the place of beginning, in point of the property lease to the parties of the second part by the heirs of Titus Conklin, for the express purpose of building a steamboat dock; to have and to hold the said premises * * * for the term of twelve years.

"GILBERT CARLL, *President.*

"Recorded by the town clerk."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 59.

Mr. STREET: I shall now read from the book of "Leases and Deeds by Truatees," vol. 2, pages 42 and 43, the entry dated Nov. 12th, 1881:

"Record of lease by the trustees of the town of Huntington to Nathaniel S. Ackerly.

"Description.—All that portion or tract of land under water belonging to the town of Huntington and lying adjacent to and near West Beach, commencing at high-water mark where the land of William G. Gardener and Charles H. Jones meets, west of said Gardener's dock, and running by high-water mark westerly and thence southerly to West Beach Point; thence northerly to the point opposite the upland of Charles H. Jones, on the outside of West Beach, and extending from said line under the waters of said
107 Northport Harbor 300 feet from the first-named point to the dock point, and thence 500 feet under the waters of said harbor to the point of West Beach and 350 feet under the waters of Huntington Bay, with the exclusive right and privilege of dredging, digging, selling, removing the gravel, grit, and sand therefrom, and to erect and use necessary structures in conducting such business thereon, upon the terms, reservation, restrictions, and conditions hereinafter mentioned, and the appurtenances, for the term of five years from the 12th day of November, 1881, at the yearly rent or sum of $400, to be paid in equal half-yearly payments, in advance, and the privilege of renewal for another term of five years at the expiration of said term.

"And the said parties of the first part do covenant that the said party of the second part, on payment of the said annual rent and performing the conditions aforesaid, shall and may peaceably and quietly hold and enjoy the said premises for the term aforesaid.

"STEVEN C. ROGERS, *President.*
"CHARLES V. SCUDDER.
"TIMOTHY OAKLEY.
"BENJAMIN DOTY.
"DOUGLAS CONKLIN.
"NATHANIEL S. ACKERLY."

The paper is witnessed and acknowledged. Certified as recorded Nov. 15th, 1881, by Douglas Conklin, town clerk.

The same objection, ruling, and exception.

The entry is Plaintiff's Exhibit No. 60.

Mr. STREET: I read from the same volume, pages 108, 109, and 110, the entry dated August 4th, 1883:

"Deed by the trustees of the town of Huntington to Abbie A. Baldwin, her heirs and assigns forever.

108 "Description.—All that certain piece or parcel of land under water situated on or adjacent to the shore on the south side of Huntington Bay, at East Neck, in the town of Huntington, Suffolk county and State of New York, adjoining the northerly side of the land of Mrs. Abbie A. Baldwin and bounded and described as follows: Commencing at a point where the lands of the said Abbie A. Baldwin join the lands of Willett Bronson on the east, at the line of ordinary high-water mark, thence northerly at right angles to the shore of said Huntington Bay 50 feet; thence westerly all the way on a line 50 feet out from the ordinary high-water mark to opposite where the east side of the road or public highway known as Bay View avenue comes down to the shore; thence southerly on a course at right angles with the shore 50 feet to ordinary high-water mark; thence easterly on the line of said ordinary high-water mark and along the uplands of said Abbie A. Baldwin to the place of beginning, being a strip of land under tide-water 50 feet wide; to have and to hold, &c.

"Quit claim deed. (Signed) Charles R. Street, president of the board of trustees." The seal of the town of Huntington. Witnessed and acknowledged. Recorded March 19th, 1884. Brewster G. Sammis, town clerk.

The same objection, ruling, and exception.

The entry is Plaintiff's Exhibit No. 61.

Mr. STREET: I read from the same volume, at pages 225, 226, 227, and 228, entry of lease dated May 1st, 1888:

"Trustees of the town of Huntington to the Huntington
109 Company.

"Description.—All that certain tract, piece, or parcel of land situate, lying, and being between high and low water mark of Huntington Bay, in front of the property of the Huntington Company, in the town of Huntington, county of Suffolk, and State of New York, bounded and described as follows: Beginning at a point in the high-water line of Huntington Bay where said high-water line is intercepted by the easterly line of the highway leading from the Vineyard road northward to Huntington, passes the residence of Titus Conklin, which said point is distant 30.6 — easterly from a granite monument situate in the high-water line of Huntington Bay, and running thence north and deflecting 53 minutes and 20 seconds to the west from the true meridian 107 feet to a point at or near the low-water line of said bay; thence north and deflecting 86 degrees 33 minutes *L*0 seconds to the east from said meridi-n and along or near said low-water line 117 feet; thence south and deflecting 9 degrees 12 minutes 20 seconds to the east from said meridian 111.49 feet to the high-water line of said bay; thence south and deflecting 85 degrees 31 minutes and 50 seconds to the west from said meridian and along high-water line of said bay 471.16 feet; thence south and deflecting 86 degrees 50 minutes 40 seconds to the west from said meridian and still along the high-water line of said bay 500 feet; thence south and deflecting 88 degrees 50 minutes 10 seconds to the west from said meridian and still along the high-water line of said bay 219.55 feet to the point or place of beginning, containing, within said bounds, 3,124 acres or 136,079 sq. ft. of land be-
110 tween the high and low water lines of said Huntington Bay, with the appurtenances, for the term of 10 years from the first day of May, 1888, at the yearly rent or sum of $20, to be paid in equal yearly payments."

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 62.

Mr. STREET: I now offer to read from volume 3 of "Deeds of the Trustees of the Town of Huntington," at page 494, the deed dated Jan. 14, 1774, by the trustees of the freeholders and commonalty of the town of Huntington to Selvanus Townsend, setting out that by virtue of the Fletcher patent granted the town in 1694 they have given, granted, and conveyed to him, his heirs and assigns forever, the right-, liberties, and privileges hereinafter mentioned, to wit, of building, making, and running of a dam to dam the water, to begin at or near about the north or northeast point of the land that the said Selvanus Townsend bought of Philip Udale, near the house of Heze-iah Wickes, and thence to run north about 22 degrees east over to the point called Jacib Platt's Point, where the said Townsend hath concluded to build the said dam and to keep the said dam as high as he, the said Townsend, shall judge most convenient, and full and free liberty to erect or build a mill or mills on the said dam, or build the same at the most proper place, at the election of said Sel-

vanus Townsend or his heirs or successors, with full liberty to dam and confine the water above the mill-dam and to improve the mill, the said dam to run across Stonybrook Harbor at the place above mentioned."

111 This document is signed by the trustees and witnessed. It is recorded by the town clerk.

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 64.

Mr. STREET: I read from a record entitled "Record of Highways, Book B," at pages 70, 71, 72, and part of 73. This is the State engineer's report, dated March 1st, 1860, upon the boundary line between Huntington and Oyster Bay, being the next town west, and defines the westerly boundary, and as that includes Lloyd's Neck, or did at that time, it gives the boundary established by the St ate surveyor. Now, after setting out the appointment of commissioners to examine as to the boundary, and the fact that they called upon the State engineer to define it and he had done so and established the boundary, then passing over that which is not material and relevant to this case, the report says:

"Running up to the upland of Huntington and West Neck, running easterly along the middle of said inlet, river, or creek until it comes against a point of Queen's village shore called Conklin's Point, and from thence upon a straight line to that part of the river or creek that lies between outward point of the east beach, putting off from Queen's village shore and the nighest point of Huntington shore."

The report is signed by Van R. Richmond, State engineer and surveyor. It is recorded by Joshua Smith, town clerk.

The same objection, ruling, and exception.
The entry is Plaintiff's Exhibit No. 65.

Mr. STREET: I shall now read from a record entitled
112 Oyster Leases, Town of Huntington." The leases we shall now read from this record are located wholly in Huntington Bay. They are quite numerous, and with the exception of the first one I can refer to them by the date and by the lot according to a chart. The first one I shall be obliged to state from the record and the remainder I can refer to by number.

The first is as follows:

Page 138 of Oyster Leases, dated Jan. 1st, 1882.—Trustees of the town of Huntington to Charles Haines: All that certain piece or parcel of land lying under water in Huntington Bay, in the town of Huntington, Suffolk county and State of New York, as more particularly described as follows: Being one-half of the plot designated on a certain map of said bay drawn by R. B. Weller, J. S. Carll, surveyors, as plot No. 6, the said half containing 25 acres 1 rood 36 poles, said map being on file in the town clerk's office of Huntington and such half being the south half of the whole tract; to be used, occupied, and enjoyed in the business of planting, growing,

and cultivating thereon and removing therefrom oysters for the term of fifteen years, to commence the first day of January, 1882." It is signed by Charles Haines and is certified.

The same objection, ruling, and exception.

The entry is Plaintiff's Exhibit No. 66.

Plaintiff's counsel stated to the court that the keeper of a life-saving station was a witness now in court, who considered it
113 his duty to return to his post as soon as possible, and counsel therefore requested consent to examine him out of the regular order or proof, and it was agreed to.

DARIUS RULAND, a witness for the plaintiff, being duly sworn, testified as follows:

By Mr. ACKERLY:

I reside at Northport, L. I., I suppose properly. I am keeper of Eaton's Neck life-saving station. I have been there fourteen years. That station is situated on the point of Eaton's Neck, the east side of Huntington Bay. The location indicated on the chart that you now show me is the proper location of the station. (Coast survey chart just shown witness is marked Plaintiff's Exhibit No. 63.) I was appointed keeper in 1875. Previous to that time I had the position as keeper of Eaton's Neck light-house; at the commencement of the spring of 1861 until 1866. That was situated near the life-saving station, within a few rods of it; a short distance. I am well acquainted with the position of Huntington Bay. I know what uses it has been put to with reference to vessels. It has been used for a harbor. I have seen there vessels and plenty of them. I have ofttimes counted from fifty to one hundred vessels lying there for a haven, anchored there for a harbor. That has been during all the time that I have described here as having been at the light-house and at the life-saving station. I have been so situated there that without any trouble I could see Huntington Bay and see what uses were made of it in this respect at all times most. It is almost im-
possible for me to state the frequency of those occurrences of
114 vessels using it as a harbor. They have mostly used it for a harbor in heavy, severe gale-, northeast and easterly winds, &c. Sailing vessels and large sound steamers, &c., have frequently gone in there for a harbor, and barges and tows as well. This does not occur two or three or four times a month, but quite frequently in case of stroms and stress of weather.

Cross-examined by counsel for defendant.

By Mr. KEOGH:

Smithtown Bay is further east than Huntington Bay. I have known vessels to anchor there when they got caught within the bend of the beach between Crane's Neck and Eaton's Neck, and couldn't make their way out to anchor, to keep from going ashore on the beach. I don't know as I have seen vessels go in Smithtown Bay to seek shelter at all. I saw one there about

three weeks ago or two weeks ago, for that matter. She got caught there and anchored, and eventually she parted her chains and went ashore and went to pieces. I think I have known a vessel to be wrecked in Huntington Bay; not frequently. The width of this arm of the sea from Lloyd's Neck to Eaton's Neck, which is at the entrance to Huntington Bay, is a trifle less than five miles; less than five miles; that is as near as I can come to it.

By the COURT: You mean from Lloyd's Neck to the point where Eaton's Neck light-house is?

A. Yes, sir; a little short of five miles.

By Mr. KEOGH:

I have known a sailing vessel or steamer to take shelter in Huntington Bay when the wind was northward. I don't mean to say that with the wind blowing a gale from the north
115 the open bay of Huntington affords any shelter for a certain class of vessels—a large class of vessels—say anything rising 300 tons. I don't think that the larger portion of the vessels that ply up and down the sound are under that size and tonnage.

Q. In your judgment, are not the greater portion of the vessels that ply up and down the sound under that size and tonnage, according to your observation, from the place you are?

A. That depends a good de*la* upon the season of the ye-rs. At the summer time there is a great many vessels that is running back and forth through the sound, and when the heavy weather commences in the fall and winter those small vessels lays up and the bigger ones continue on. Take the entire year, from January 1st to the last day of December, on an average the greater portion of the vessels that use the sound as a water-way I don't think are under the size that I have mentioned. For vessels under 300 tons I would consider Huntington Bay with the wind blowing from the north a very poor harbor.

Q. It would be no harbor for a small vessel with the wind blowing from the north, would it?

A. Of course, a small vessel in there for a harbor and the wind coming from the north there is other havens that they would make.

Q. That is not my question. Would you call it a harbor at all for small vessels with the wind blowing from the north?

A. No; it would be a poor harbor for small vessels. A poor harbor is not worse than none; any port in a storm. Portions of the bay is a harbor for vessels under 300 tons with the
116 wind blowing a gale from the northwest; any portion above Rocky Point, which is situated on Lloyd's Neck. That harbor is more of a shelter to a small vessel with the wind blowing from the north than the land of Long Island itself is; if you get under its le*a* it is.

Q. Is not Long Island itself a shelter?

A. Excuse me a minute. As you are going through to the westward the sound narrows, further to the eastward it widens; consequently it would be, of course, smoother to the westward, where the

sound narrows. The land of Long Island itself does not afford a shelter when the wind is easterly. A portion of it gives them a lee. Crane Neck, Oldfield, and the mouth of Huntington Bay, and to the west of Lloyd's Neck, and further on down west, Cow Bay, &c., all of those furnish a lee with easterly winds.

Redirect by counsel for plaintiff.

By Mr. ACKERLY:

Q. You were asked about vessels being wrecked in Huntington Bay. What part?

A. Near the entrance of the bay from the sound; some on Lloyd's Neck, *bot* on Eaton's Neck itself, near my place. The vessels that went ashore in a storm near Lloyd's Neck went ashore in a heavy northwest wind on Eaton's Neck side. There was no ice there at the time the vessel went ashore, at the time that I allude to now; one vessel in particular. There was another vessel that was iced besides the Sarah Pervis. There were only two vessels that I know of that were wrecked there.

By the COURT:

Q. Where?

117 A. About a mile and a half or a mile from the extreme point of Eaton's Neck.

Q. Inshore from the light-house?

A. Yes, sir; to the south.

By Mr. ACKERLY: These vessels that went ashore on Lloyd's Neck were anchored there for a harbor?

A. To my recollection, there was two anchored in there for a harbor, and it came on to blow a gale and very severe weather. It got to freezing fast, and the ice took one of them ashore and cut her in two. That is liable to happen in any harbor.

Q. One of these vessels went ashore in what circumstances? Was one of them the case where people were drowned and before the station was established?

A. The Francis V. Turner; she drifted on there after she was water-logged and capsized in the storm.

Q. She hadn't made Huntington Bay for a harbor, *dah* she?

A. I don't know about that; this particular one that you allude to came from the eastward. She hadn't been in Huntington Bay for a harbor. The distance from Target Rock to Eaton's Neck I can't tell exactly, but I should suppose it was in the neighborhood of two miles. It may be short of two miles, but somewhere in that neighborhood.

By the COURT:

Q. Is that the narrowest part between the two necks?

A. No, sir; it narrows as you go up farther.

OSCAR DARLING, a witness for the plaintiff, being duly affirmed, testifies:

By Mr. STREET:

118 I have resided in Huntington, L. I., about fifteen years. I am a civil engineer. I have been successively engaged in the business of civil engineer about 21 or 22 years last past. This map shown me was made by me at the date shown upon it. This map A of oyster lands of Huntington Bay, town of Huntington, Suffolk Co., State of New York, surveyed August, 1887; that is a correct map.

The map is received in evidence and marked Plaintiff's Exhibit No. 67.

Mr. STREET: We offer now from the register of oyster leases of the town of Huntington, at page 174, the lease dated October 20th, 1887, being a lease by the trustees of the town of Huntington to Edward Thomson:

All that certain piece or parcel of land under the water of Huntington Bay, being parts of lots No. 18 and 19 on map Exhibit No. 67, being established on a map attached to and forming part of said lease, the tract herein let containing 31.45 acres, for oyster culture for the term of fifteen years, to commence the 20th day of October, 1887, at the yearly rent of $23.58. Covenants. Quiet possession. Leasee will keep the premises marked with stakes and buoys. At the end of the term and upon certain conditions the lease may be renewed; and there is the express covenant, this lease is made and accepted upon the express condition, anything hereinbefore contained to the contrary notwithstanding, that if this lease is assigned, or the leased premises or any part thereof, or sublet to any person or persons or corporation who is or are not residents of the town of Hunt-
119 ington, this lease for the term of years herein granted is at once to be void and cease and determine, and the granted premises revert to the party of the first part, their successors and assigns, with the immdeiate right to re-enter and take possession thereof.

Signed by the trustees.

Under the seal of the trustees. Signed by the leasee. Acknowledged by all the parties.

Mr. STREET: We offer that lease and the map attached to it in evidence.

The same objection, ruling, and exception.

The lease is marked Plaintiff's Exhibit No. 69.

Mr. STREET: From the same book we offer the lease dated October 20th, 1887, as follows:

Lease to Nathaniel S. Ackerly of lands lying under water in Huntington Bay, being part of lots Nos. 16 and 17 on map Exhibit No. 67, the easterly or shore line of the tract herein let being the tract established on a map attached to the lease this date granted to Edward Thomson, containing 24.16 acres, for the term of fifteen

years two months eleven days; yeraly rent, $18.17; in the same form and containing the same covenants as in the lease hereinbefore offered in evidence.

Same objection, ruling, and exception.
The lease is marked Plaintiff's Exhibit No. 70.

Mr. STREET: I offer from the same volume, at page 176, the following:

Lease, dated December 12th, 1887, to Charles Haines of land under Huntington Bay for oyster culture: The southerly
120 half of lot No. 101, the whole of lot 100, and the whole of that part of lot 104 lying between lot 100 and the shore line and not less than 7 feet of water at low tide, and all that southeasterly quarter of lot No. 103 lying between lot No. 101 and the shore line of not less than 7 feet of water at low tide, as the same appears on the map Plaintiff's Exhibit No. 67, containing in all 40 acres, for the term of 10 years, commencing January 1st, 1888; the same covenants; the same signatures and seal, and acknowledged as in the lease Exhibit No. 69.

The same objection, ruling, and exception.
The lease is marked Plaintiff's Exhibit No. 71.

Mr. STREET: I offer from the same volume, at page 177, the following:

Lease to Edward B. Fox of lands under water in Huntington Bay: Lot 99, the northerly half of lot No. 98, all that part of lot No. 105 lying between lot No. 99 and a shore line of not less than seven feet at low tide, and all of the northerly quarter of lot No. 106 lying between lot No. 98 and a shore line of not less than seven feet at low tide, containing in all forty acres, as the same appears on a map of Huntington Bay marked in evidence in this case Exhibit No. 67; the same form of covenant; signed and acknowledged in the same manner as the preceding leases dated Dec. 12th, 1887.

The same objection, ruling, and exception.
The lease is Plaintiff's Exhibit No. 72.

Mr. STREET: I offer in evidence from the same volume at
121 page 178:

Lease dated Dec. 13th, 1887, for the period of ten years to Dexter K. Cole of lnads under Huntington Bay, being parts of lots Nos. 7, 8, 9, 32, 33, and 34, shown on a map of Huntington Bay, marked Plaintiff's Exhibit No. 67, and also parts of lots shown on a map made by Oscar Darling, heretofore attached to and forming part of this lease, to identify the particular parts of lots hereby leased, and containing 30.10 acres. This lease is in the same form, has the same covenant, and is executed and acknowledged in the same manner as the preceding leases, except that it also states the covenant the said Dexter K. Cole shall become a resident of the town of Huntington before May 5th, 1888.

The same objection, ruling, and exception.
The lease is Plaintiff's Exhibit No. 73.

Mr. STREET: I offer in evidence from the same volume, at page 179, the following:

Lease dated November 16, 1887, for ten years to Henry B. Mulford: Part of lots Nos. 1, 2, 3, 4, 5, and 6, as shown on the map Plaintiff's Exhibit No. 67, also shown on a map made by Oscar Darling, attached to and forming part of this lease, containing 20.95 acres. The lease is in the same form, having the same covenants, and executed and acknowledged in the same manner as the preceding exhibits.

The same objection, ruling, and exception.

The lease is Plaintiffs Exhibit No. 74.

Mr. STREET: I offer in evidence from the same volume, at page 180, the following:

122 Lease dated Feb. 10th, 1888, for ten years to H. L. Washburn: All that piece or parcel of land designated and described in a certain map of said bay and entitled map A, being plot No. 115, and containing twenty acres, said map being on file in the town's clerk's office in the town of Huntington. The lease is in the same form, having the same covenants, and is executed and acknowledged in the same manne- as the preceding exhibits.

The same objection, ruling, and exception.

The lease is Plaintiff's Exhibit No. 75.

Mr. STREET: I offer in evidence from the same volume, at page 181, the following:

Lease dated Feb. 10th, 1888, for ten years to H. L. Washburn of lands under Huntington Bay, described: All that certain piece or parcel of land under Huntington Bay designated and described in a certain map of said bay and entitled map A, being plot No. 116, and containing twenty acres, said map being on file in the town clerk's office in the town of Huntington.

The same objection, ruling, and exception.

The paper is Plaintiff's Exhibit No. 76.

Paper shown me is part of my records as clerk of the town of Huntington.

Mr. STREET: I offer the paper in evidence. It shows an award of boundaries between the town of Huntington and Lloyd's Neck, dated May 30th, 1734, signed by William Willis, D. Jones, and Richard Woodhull.

The same objection, ruling, and exception.

123 The paper is marked Plaintiff's Exhibit No. 77.

*Award of Boundaries.*

MAY 30, 1734.

Whereas there is a dispute between Mr. Henry Lloyd of ye Manour of Queens Village and the inhabitants of the Town of Huntington concerning the boundary between ye said Manour of Queens Village and the said Town of Huntington, which said dispute being by

the said Henry Lloyd and the President and Trustees of the Town of Huntington, on the part of the said Town submitted to the judgment & determination of us the subscribers, we having considered the allegations of both parties do award adjudge and determine that the first bounder shall be a stake stuck up in the Body of the Beech Sixteen Rods from the upland of Huntington West Neck at the entrance on the said Beech from which stake the line to run northerly upon a Strait Line to another Stake Stuck up sixteen Rods west from the next point of upland upon ye West Neck, from which Stake Still northerly upon a straight Line to another stake stuck up eighteen rods west from the next point of upland upon the West Neck from which stake still northerly upon a straight Line to another Stake stuck up twenty Rods west from ye next Point of upland upon the west Neck from which Stake Still Northerly upon a Strait Line to another Stake which shall be stuck up Sixteen Rods west from the upland of ye Bluff Point, from which last Stake so to be stuck up Sixteen Rods west from ye upland of ye Bluff Point the Middle of ye Chanel to be the Bounds between ye
124 Manour of Queens Village and the Town of Huntington, till it comes to certain ways exacted by the inhabitants of Huntington for ye taking of catching of fish from thence northerly to ye middle of ye Inlet River or creek between ye upland of Queens Village to ye upland of Huntington West Neck from thence running easterly along ye middle of ye sd Inlet River or Creek till it comes against a point on Queens Village called Conklins Point and a Point on Huntington shore called Sandy Point almost opposite to ye sd Conklins Point And from thence upon a straight Line to ye Middle of that part of ye Inlett River or Creek that runs between the outward Point of the East Beech putting off from Queens Village Shore and the nighest Land upon Huntington shore then beginning again at ye first Stake Standing in the Body of ye Beech at ye entrance on to ye sd Beech Sixteen Rods from ye upland of ye West Neck the Line to run Southerly into Fleets Hole keeping ye middle of ye sd Hole or Inlet till it comes into ye Bay or Harbour, which sd Line & Bounds as above expressed shall be ye certain Boundaries between ye Town of Huntington & ye Manour of Queens Village forever saving to the alowed Henry Lloyd his heirs & assigns forever all such privileges on Huntington side as were granted and allowed unto Mr. James Lloyd by ye Inhabitants of Huntington in one certain Indenture of agreement between ye sd James Lloyd & ye sd Inhabitants of Huntington bearing date March 1685–6 as by ye sd agreement will more largely appear. In
125 witness whereof we hereto set our hands & seals this 30th Day of May Anno Domini 1734.

WILLIAM WILLIS. [L. S.]
D. JONES. [L. S.]
RICHARD WOODHUL. [L. S.]

This is recorded in the 169 page of the third book made by me.

EPINETUS PLATT,
*Town Clerk.*

The paper now shown me is a part of the records of the town of Huntington.

Mr. STREET: I offer this paper in evidence. It is a deed by the trustees of the town of Huntington to Zopher Platt, dated April 10th, 1752, giving a mill privilege in Huntington Harbor and authorizing the damming off of a large part of that harbor.

The same objection, ruling, and exception.
The paper is marked Plaintiff's Exhibit No. 78.

*Deed to Zopher Platt, April* 20, 1752.

This indenture made this tenth day of April in the year of our Lord one Thousand Seven Hundred and fifty two by and between Capt. Isaac Platt Eliphlet Wicks Joseph Lewis Moses Scudder Joseph Whitman Thomas Conklin & Reuben Brush all Trustees for the time being of the Town of Huntington Suffolk County on Nassau Island Duly elected and chosen for this present year for the time being by the freeholders and Commonalty of the sd Town of the one part and Zopher Platt of the Same Town and County and
126 Island of the other part witnesseth that whereas Benjamin Fletcher Capt Generall & Govrnour in Chief of the Province of New York and Territories thereon Defending in America &c. By his certain Patent under his hand Bearing Date the fifth Day of October in the year of our Lord one Thousand Six hundred & ninety-four did give and grant unto the freeholders and commonalty of the Town of Huntington and their Heirs and Successors the privilege of a body Corporal and Politique; and of choosing and Electing and Appointing Seven Trustees yearly & every year to act and manage the Publique affairs of the freeholders and Commonalty of the Town aforesd and with all giving unto the trustees aforesd for the time being full power and authority to give grant Release aliene Assign & Dispose of Lands Tenements & hereditaments and all and every other thing and things act & acts to do and execute by the name of the Trustees of the Freeholders & Commonalty of the Town of Huntington aforesd as may more fully largely and Plainly appear by the sd Patent afore Recited—Now Know ye that this Indenture further witnesseth that we the sd Isaac Platt Eliphlet Wicks Joseph Lewis Moses Scudder Joseph Whittman Thomas Conklin & Reuben Brush trustees for the time being in the name of the trustees of the freeholders and Commonalty of the Town of Huntington for ourselves our heirs Successors & the freeholders and Comonalty of the sd Town for which considerations and Imunities hereafter expressed and mentioned in behalf of the freeholders and Comonalty of the Town aforesd to be granted unto Them and us by the sd Zo-
127 pher Platt his heirs and successors. We the sd Trustees have given granted Released Conveyed Assured Enfeofed and confirmed and by these presents for ourselves our heirs Successors and the freeholders and Inhabitants and Comonalty of the sd Town do Give Grant Release Convey Assure Enfeof and Confirm unto him the sd Zopher Platt his heirs and assigns forever The Rights

Liberties & priveledges hereafter mentioned to witt of building making & Running of a Dam to Dam the water at the head or near. the head of Huntington Harbour to Run from the Town point of the Salt Marsh on the East side of the Creek across to the shore on the west side of the creek near opposite to the house that formerly Belonged to Joseph Dean Deceased or att the place that the sd Zopher Platt shall judge most convenient & to Raise the Dam as high on the Mash as he shall Judge most Convenient full and free liberty to erect or build a mill or mills on the sd Dam or below the Sound at the most proper Place at the election of the sd Zopher Platt or his heirs or Successors with free Liberty to Dam and Confine the water above the Mill Dam and to Emprove the Same, and further in case when the mill pond should be made and there should hereafter grow and be oysters in the sd Mill pond that the sd Zopher Platt his heirs Assign & Successors to Rick gather or rake oysters for his family use from time to time and at all times forever hereafter as also free and full Liberty of Diging and carrying of Earth for the building or Repairing the sd Mill Dam off the Highways or
128 Commons not Prejudiceing the Highways To have and to Hold all the above granted and bargained premises with their Appurtenances unto him the sd Zopher Platt his heirs Successors & Assigns forever to his and their own sole and proper use Benefit and Behoof from henceforth & forever and we the sd Trustees in the name of the Trustees of the Freeholders and Commality of the Town do Covenant grant and Agree to and with him the sd Zopher Platt his heirs Excors Successors and assigns that it shall and may be Lawfull for him the sd Zopher Platt his heirs Successors and Assigns to have hold use and Improve all the above Granted Priviledges and all the mills Erections Buildings and Emprovements that he or his heirs or Successors may hereafter make Improvements or erect on the Privilidges above granted without the Lest Hindrance or molestation of us the Trustees for the time being or our Successors & the freeholders & Comonalty of the Town aforesaid and this Indenture further witnesseth that the sd Zopher Platt for and in Consideration of the above granted Priviledge for myself my heirs Successors and Assigns do article covenant Stipulate and agree and by these presents do fully and absolutely article covenant Stipulate and agree to and with the said trustees for the time being and their Successors that I the sd Zopher Platt my heirs Successors & Assigns will employ my upper mills that I bought of Jacob Scudder to Grind Corn and Grain of the freeholders and Inhabitants of the Town of Huntington from time to time as far forth as my above sd Mills are Capable to perform. They the said freeholders and Inhabitants allowing the one Tenth part to be taken for the Toll for grinding to him the sd. Zopher Platt his heirs Successors & Assigns forever the being present Comon Custom
129 of Toll and I the said Zopher Platt for me my heirs Successors and assigns do further Covenant and agree to and with the said Trustees for the time being their heirs and successors to make and Support a dam across the Creek Below the Road and to dig a Ditch and turn the current or Stream of water into the Cove

Below Benjah Jarvis house. Item. I the said Zopher Platt for myself my heirs Successors and assigns do covenant article and agree that the said freeholders and Commonality of the Town aforesaid may and shall have Liberty att any time & all times hereafter of fishing & gathering of oysters in the Mill pond when they breed grow and are there to be had and further it is stipulated concluded covenanted and agreed unto by the sd Trustees in behalf of themselves their Successors the freeholders and Inhabitants of the Town on the one part; and the said Zopher Platt on the other part that in case it should so happen that the said Zopher Platt should not go on to build a mill or mills Dam at the head of Huntington Harbour as above described and will Deliver up his right to the Town again of the present Grant that then in such case the use of his upper mills shall Revert to his own Disposal & Employment as he shall see cause to employ them.

In witness hereof the sd Trustees above named of the one part and Zopher Platt of the other part have sett to our hand and fixed our Seals the day and year above written.

Signed Sealed and Delivered in the presence of us—
SAMUEL CLARKE,
ISCIRALE TOTTON.

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ISAAC PLATT [L. S.]
ELIPHLET WICKES [L. S.]
JOSEPH LEWIS [L. S.]
ZOPHER PLATT [L. S.] MOSES SCUDDER [L. S.]
JOSEPH WHITMAN [L. S.]
THOMAS CONKLIN [L. S.]
REUBEN BRUSH [L. S.]

Memorandum that on the fourth Day of May, Anno D. 1752 then Personally appeared Before me Jonas Williams one of his Majesty's Justices of the Peace for the County of Suffolk the within named trustees of Huntington of ye said party and Zopher Platt of the other party and did every one and acknowledge this to be their free Voluntary act and Deed for the use within mentioned likewise their names and seals.

JAMES WILLIAMS, *Justice.*

The paper now shown me is a part of the records of the town of Huntington.

Mr. STREET: I offer this paper in evidence. It is the original lease by the trustees of the town of Huntington to Shubal Smith, being a privilege of ferry from Huntington to Norwalk, Conn. It is dated May 8th, 1772.

The same objection, ruling, and exception.

The paper is marked Plaintiff's Exhibit No. 79.

*Lease of Ferry Privileges May* 8, 1772.

This Indenture made this Eighth Day of May Anno
131 domini 1772 by and Between Israel Wood President Jonas Williams Esq. John Wood, Stephen Kelley, Timothy Coell,

James Henry Scudder & Solomon Ketcham Present Trustees of the Town of Huntington in Suffolk County of the one part & Theobal Smith of the same place of the other part—Witnesseth that the said Trustees above named for and in consideration of The yearly rents Covenants & Conditions hereinafter exprest on the part & Behalf of the sd. Theobal Smith his Exrs. Admst. & Assigns hath Demised Granted & to farm Lotten & by these presents do Absolutely Demise Grant & to farm Lot unto the said Theobal Smith & to his heirs & Assigns the ferry from Huntington Harbour to Norwalk if he shall keep but one boat, But if he shall keep two boats one shall be stationed to go from sd. Huntington Harbour to Norwalk & the other ferry Boat to go from sd. Huntington Harbour to other places—he to have the whole privilege of said ferry for or untill the first day of May next he or his Heirs or assigns renderin & paying at or Before the expiration of the sd. term unto the sd. Trustees or their Successors the sum of two pounds Current money of New York and he to have ferrage for a single man two shillings & for a man & horse four shillings & Sixpence Current money of New York and at the expiration of the sd. term to Desist from Carrying any more Passengers if required by the sd. Trustees and for the true performance of the said Covenants & Agreements each of the sd. Parties have to these presents Interchangably set to their hands & Seals the Day & year above written.

132 Sealed & Delivered In the presence of—
NATHANIEL HAR-I-YSEN.
JEREMIAH WOOD.

Memorandum that the said Theobal Smith is to keep his Boat or Boats in good repair & to attend at all Seasons whose winds & weather will permit, written before sealing.

P. I.

| | | | |
|---|---|---|---|
| TIMOTHY COREL | [L. S.] | ISRAEL WOOD | [L. S.] |
| HENRY SCUDDER | [L. S.] | JONAS WILLIAMS | [L. S.] |
| SOLOMON KETCHAM | [L. S.] | JOHN WOOD | [L. S.] |
| THEOBAEL SMITH | [L. S.] | STEPHEN KELEY | [L. S.] |

Mr. STREET: We offer in evidence the original deed by the Trustees of the Town of Huntington to Reuben Johnson, conveying lands under water in Huntington Harbor running to *a* the channel. It is dated May 24th, 1775.

The same objection, ruling, and exception.
The paper is marked Plaintiff's Exhibit No. 80.

*Deed to Reuben Johnson May 24th, 1775.*

This Indenture made this twenty fourth Day of May in the year of our Lord one thousand Seven hundred and Seventy five by and between Israel Wood President Capt. Timothy Corll, Samuel Oakley,
Stephen Kelley, Solomon Ketcham, Gilbert Fleet, and Tim-
133 othy Conklin all Present Trustees of the freeholders and Commonality of the Town of Huntington in Suffolk County

in the Province of New York of the one part and Reuben Johnson of the same Place Yeoman of the other Part—Witnesseth that whereas Benjamin Fletcher formerly Governor in Chief in and over the Province of New York in his & Prerogative Seal of the City of New York bearing Date the fifth Day of October 1694 Did Give and Grant unto the first Modern Trustees of the freeholders and Commonality of the said Town of Huntington and their Successors full power and authority to Give Grant relies alien assign and dispose of lands tenements &c: as by said Pattent may more at large appear reference thereunto being had—Now Know Ye—That we the said Trustees of the freeholders of said town for and in consideration of the sum of twenty Nine pounds four shillings Current money of New York to us in hand well and truly paid by the said Reuben Johnson the receipt whereof we do hereby acknowledge and ourselves therewith to be fully satisfied and contented and thereof and every part and parcell thereof Do exonarate acquitt & fully discharge him the said Reuben Johnson his heirs executore & administrators forever by these presents hath given granted Bargained sold aliened and enfeoffed conveyed and confirmed and by these Presents do fully freely and actually—

Bounded Northerly by the Salt water or as the thatch groweth and bounded westerly to the channell and Southwardly by the
134 thatch or Salt marsh which we sold to Thomas Scudder or so far as the said Reuben's land goeth and Bounded eastwardly by the upland of the said Reuben Johnson be the quantity of acres more or less together with all the Priviledges and Appurtenances thereunto Belonging To have & To hold all the above granted Premises with the appurtenances unto him the said Reuben Johnson his heirs and assign to his & their only Propper use Benefit and Behoof forever and we the said Trustees above named Do Hereby Declare that by Virtue of the above Cited Pattent we have in ourselves full power & Authority to Grant sell & Dispose of the same in manner as above said and that the said Reuben Johnson his heirs & Assigns shall & may at all times hereafter Lawfully and Peacably have hold & improve the same free & Clear with any Lott hinderance or Molestation of us the said Trustees for the time being or our Successors or any other person claiming any right title or interest from by or under us or our heirs Successors or assigns forever—In Witness whereof we the said Trustees above named have hereunto set our Hand and affixed our town Seal the day and year in this Indenture first above written.

Sealed & Delivered In the presence of—
JESSE SAMMIS
JOHN SAMMIS

ISRAEL WOOD [L. S.]
TIMOTHY COREL [L. S.]
SAMUEL OAKLEY [L. S.]
STEPHEN KELEY [L. S.]
SOLOMON KETCHAM [L. S.]
GILBERT FLEET [L. S.]
TIMOTHY CONKLIN [L. S.]

135 Mr. STREET: We offer in evidence what appears to be on its face an original paper, being the proceeding- of the board of trustees of the town of Huntington, dated June 28th, 1808. It is as follows:

Resolved, That if any person or persons shall come into the said bay belonging to the said town of Huntington not being inhabitants thereof and catch any clams, except the inhabitants of Islip and Oyster Bay, — shall forfeit and pay the sum of $12.50 for every such offence.

By order of the trustees.

MOSES ROLPH, *Clerk.*

The same objection, ruling, and exception.

The entry is Plaintiff's Exhibit No. 81.

Mr. STREET: We offer from the volumes of Oyster Leases heretofore produced a lease, at page 31, as follows:

Lease, dated Jan. 1, 1882, by the trustees of the town of Huntington to Theodore S. Lowndes.—All that parcel of land lying under the water of Northport Harbor, in the town of Huntington, Suffolk county, State of New York, and more particularly described as follows: All that oyster land now occupied by the parties of the second part in Northport Harbor, to be surveyed and numbered and put on a map of said harbor drawn by R. P. Wheeler and David S. Carll, surveyors, filed in the town clerk's office, with the appurtenance-, etc., to be used, occupied, and enjoyed exclusively by the party of the second part in the business of growing and cultivating therein oysters for the term of fifteen years and four months, to com-
136 mence the first day of Jan., 1882, at an annual rental of fifty cents per acre. The lease is in the same form and is executed in the same way and containing the same covenants as the leases heretofore offered, except that it does not contain the covenant that it shall not be assigned to a non-resident.

Mr. KEOGH: Lease objected to on the ground that the water or the lands under the water covered by that lease are not part of Huntington Bay.

The COURT: This is a lease to the defendant in the present suit.

Overruled. Exception.

Mr. ACKERLY: We have books here of the town meetings since 1694, showing that the election of these trustees has continued right along down every year until 1872, when an act was passed making certain officers of the town trustees. We do not wish to take up the time offering these in evidence unless it is desired by the court or counsel on the other side.

Mr. KEOGH: You may ask the witness now on the stand if the records herein in court contain a record of the election year after year.

By Mr. ACKERLY:

I am familiar with these books with reference to the town meet-

ings of the town of Huntington. It appears from them that the trustees have been elected. The trustees have been elected for the last few years; down to 1872, or along there, we did. I don't remember the date exactly; and since then the officers designated
137 in the act have acted as trustees; and those officers are supervisor and the town clerk and three assessors for the past ten years. Under this act the supervisor, town clerk, and assessors are *ex officio* trustees.

Cross-examined by counsel for defendants.

By Mr. KEOGH:

Whether C. R. Robbins was a resident of the town of Huntington in 1882 and 1883 I couldn't say positively. I know him; I know the man; and, as far as I know, he was a resident of the town. He lives in the town of Huntington now. I don't know what his business is. I couldn't tell if he was engaged in the oyster business. I do not know what his business is. I couldn't state with regard to that. I don't know whether Andrew Ackerly was a resident of the town in 1882 and 1883. I know Andrew Ackerly. He is now a resident of the town. I have known him to be a resident of the town of Huntington about three years, I think. I think he is an oysterman; in the oyster business.

Mr. ACKERLY: The act of 1880 provides that when the Governor of the State of Connecticut shall ratify the proceedings fixing the boundary line there shall be filed a notice to that effect in the office of the secretary of state in the State of New York, and thereupon the act shall take effect. We have a certificate showing that the Governor of New York filed in the secretary's office July 3rd, 1880, a certificate reciting that he had received notice from the Governor of Connecticut that the act had been passed by the Legislature of Connecticut ratifying the boundary, and that, according to
138 our law, is a ratification. We offer the certificate in evidence.

The certificate is marked Plaintiff's Exhibit No. 83.

*Governor's Certificate, July* 3, 1883.

STATE OF CONNECTICUT,
OFFICE OF THE SECRETARY OF STATE.

General Assembly, January session, A. D. 1880.

*Senate Joint Resolution No.* 33.

(67.)

Boundary line between Connecticut and New York.

Whereas an agreement has been made between commissioners

appointed by the State of Connecticut, of the one part, and commissioners appointed by the State of New York, of the other part, a copy of which agreement is as follows, to wit:

Memorandum of agreement by and between the subscribers, commissioners of the State- of New York and Connecticut respectively, to settle the question of the boundaries between said State-, being thereunto authorized by the resolutions of said States respectively passed by them as hereunto annexed—that is to say, we, Allen C. Beach, secretary of state; Augustus Schoonmaker, attorney general, and Horatio Seymour, Jr., State engineer and surveyor, commissioners of the State of New York, and we, Origen S. Seymour, Lafayette S. Foster, and William T. Minor, commissioners of the State of Connecticut, have agreed and do hereby agree to fix, de-
139 termine, and establish the boundaries between our respective States, subject to the approval and ratification of the Legislatures of our respective States, in the following manner:

We agree that the boundary on the land constituting the western boundary of Connecticut and the eastern boundary of the State of New York shall be and is as the same was defined by monuments erected by commissioners appointed by the Legislature of the State of New York and completed in the year 1860—the said boundary line from Byram Point (formerly called Lyon's Point) on the south to the State of Massachusetts on the north; and we further agree that the boundary on the sound shall be and is as follows: Beginning at a point in the centre of the channel about six hundred feet south of the extreme rocks of Byram Point, marked No. 0 on appended U. S. Coast Survey chart, thence running in a true southeast course three and one-quarter statute miles; thence in a straight line (the arc of a great circle) northeasterly to a point four statute miles true south of New London light-house; thence northeasterly to a point marked No. 1 on the annexed U. S. Coast Survey chart of Fisher's Island Sound, which point is on the long E. ¾ N. sailing course drawn on said map and is about one thousand feet northerly from the Hammock or N. Dumpling light-house; thence, following the said E. ¾ N. sailing course as laid down on said map, easterly to a point marked No. 2 on said map; thence southeasterly toward a point marked No. 3 on said map so far as said States are coterminus: Provided, how-
140 ever, that nothing in the foregoing agreement contained shall be construed to affect existing titles to property, corporeal or incorporeal, held under grants heretofore made by either of said States, nor to affect existing rights which said States or either of them or which the citizens of either of said States may have by grant, letters patent, or prescription of fishing in the waters of said sound, whether for shell or floating fish, irrespective of the boundary line hereby established, it not being the purpose of this agreement to define, limit, or interfere with any such right, rights, or privileges, whatsoever the same may be.

In witness whereof we have hereunto set our hand- to this instrument and to a duplicate thereof December 8, 1879.

ALLEN C. BEACH,
*Secretary of State,*
AUGUSTUS SCHOONMAKER,
*Attorney General,*
HORATIO SEYMOUR, JR.,
*State Engineer and Surveyor,*
*Commissioners of the State of New York.*
ORIGEN S. SEYMOUR,
LAFAYETTE S. FOSTER,
WILLIAM T. MINOR,
*Commissioners of the State of Connecticut.*

A duplicate original of which agreement, with the charts therein referred to, is on file in the office of the secretary of this State: Now, therefore, it is resolved by this General Assembly—

141 SECTION 1. That said agreement be, and the same is hereby, approved and adopted by the State of Connecticut.

SEC. 2. The Governor is authorized and requested to communicate the foregoing action of this Assembly to the Governor of the State of New York, and upon due notice being received of the adoption of said agreement by the State of New York such notice shall, under the authority of the Governor of this State, be filed in the office of the secretary of this State, and upon the same being so filed said agreement shall become binding and operative and in full force, and the boundary between this State and the State of New York shall be fixed and established as therein agreed.

SEC. 3. Upon the ratification of said agreement the Governor is authorized, in concurrence with the executive of New York, to communicate to Congress the action of the two States on this subject and to request the approval of Congress of the boundaries established.

Certified as correct by—
ROBERT COIT,
MARCUS DE FOREST, JR.,
*Engrossing Committee.*

HOUSE OF REPRESENTATIVES, *March* 4, 1880.

Passed.

CLINTON SPENCER, *Clerk.*

SENATE, *February* 19, 1880.

Passed.

EDGAR M. WARNER, *Clerk.*

Approved March 12th, 1880.

CHARLES B. ANDREWS, *Governor.*

142 STATE OF CONNECTICUT,
OFFICE OF THE SECRETARY OF STATE.

I hereby certify that the foregoing is a true copy of record in this office.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of said State, at Hartford, this sixth day of June, A. D. 1880.

DAVID TORRANCE,
*Secretary of State.*

(Endorsed:) State of New York. Office of the secretary of state. Filed Jul- 6, 1880. Jos. B. Carr, secretary of state.

STATE OF NEW YORK, EXECUTIVE CHAMBER,
ALBANY, *July* 3, 1880.

SIR: Having received from the Governor of the State of Connecticut a certified copy of the joint resolution of the General Assembly of that State ratifying the agreement had between the commissioners appointed by the State of Connecticut, on the one part, and the commissioners appointed by the State of New York,
143 on the other part, in the matter of the boundary line between the States of Connecticut and New York, therefore, pursuant to chapter 213 of the Laws of 1880, section 2, it is hereby requested that the enclosed certified copy of said agreement, ratified by the General Assembly of Connecticut and received by me from the Governor of that State, be placed on file as due notice of the confirmation of said agreement, as in the act referred to provided.

Yours respectfully, ALONZO B. CORNELL.

To the Hon. Joseph B. Carr, secretary of state.

(Endorsed:) State of New York. Office of the secretary of state. Filed Jul- 6, 1880. Jos. B. Carr, secretary of state.

STATE OF NEW YORK,
*Office of the Secretary of State,* } ss:

I have compared the preceding copy of joint resolution of the General Assembly of the State of Connecticut ratifying the
144 agreement had between the commissioners appointed by the State of Connecticut, on the one part, and the commissioners appointed by the State of New York, on the other part, in the matter of the boundary line between the States of Connecticut and New York, and the communication (pursuant to sec. 2 of chap. 213, Laws of 1880) of Governor Alonzo B. Cornell to the secretary of state accompanying the same, both filed in this office July 6, 1880, and I do hereby certify the same to be correct transcripts therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary of
[L. S.] state, at the city of Albany, the twelfth day of November, one thousand eight hundred and eighty-nine.

FREDERICK COOK,
*Secretary of State.*

OSCAR DARLING, a witness for the plaintiff, recalled and further examined.

By Mr. ACKERLY:

Q. I read to you from the printed record the following description:

Where does Huntington Bay lie, — reference to the east and west description given there?

A. It lies between those two points mentioned.

Q. I show you a map, Exhibit No. 67. What does the center line represent, with reference to the ceding act of the State? Do you remember the description in the ceding act of the State of New York?

145 A. I don't recollect it at this moment. The line runs from the granite monument on Eaton's Neck to a point on Lloyd's Neck. I set that monument. That line runs on a course south 59 degrees 20 minutes and 25 seconds west. That is the line represented, and that runs to a locust monument on Lloyd's Neck. Huntington Bay, all this oyster ground referred to here, is included in it to the southward, the distance on that line from the granite to the locust monument. The distance from point to point is about 13,500 feet—2.5 land miles. Takinh what is put down on this map as Target Rock and going on a line at about at right angles to it to Eaton's Neck, the distance across there, as I have computed that, is 7,300 feet—1.4 miles.

By the COURT:

Q. And that is the nearest point from Target Rock to Eaton's Neck?

A. Yes, sir; about.

By Mr. ACKERLY: Taking it from the granite monument set on Lloyd's Neck to the granite monument marked as being set on West Beach, the distance is 6,910 feet and a fraction—1.3 miles.

By the COURT:

Q. That is the narrowest part of the entrance?

A. Yes, sir; that is the narrowest part of the entrance.

By Mr. ACKERLY: That granite monument is about midway between Target Rock and the light-house.

By the COURT:

Q. Whereabouts is the granite monument on West Beach?

146 A. I should say it was about two-fifths of the distance from the head land to the point.

By Mr. ACKERLY: The course between those two monuments is a true east and west course; the depth of the bay, taking the line from about the center of the bay at its head to the line established by the State ceding act, is a trifle over 2.8 land miles.

Taking the line about the center of the entrance to Northport Bay as marked on this map to the mouth of Lloyd's harbor, the dis-

tance on the east and west line is a trifle less than 1.8 miles. I am familiar with West Beach. I have been familiar with it since 1877 or 1878; somewheres about that. That puts off from Eaton's Neck. Huntington Bay is to the west; east of it is Northport Bay. There has been as accretion on that beach extending to the south, gradually extending to the south. The northwest wind strikes the strongest on the beach. The erosion is carried to the south the extent of that. Since I have been familiar with the beach — has extended nearly 200 feet within my recollection—that is, to the south.

Q. I call your attention to the engineer's report put in evidence yesterday; it is dated 1760:

"From thence running easterly along the middle of said inlet, river, or creek until it comes against a point of Queens Village called Kalums's Point, and from thence upon a straight line to that part of the river or creek that lies between the outer point of the east beach putting off from the Queens village shore and the
147 nighest land upon Huntington shore."

Can you tell me about where that point ends on the map?

A. Between what is called Light-House Point and Kalmn's Point.

Q. On this map made by you?

A. Yes, sir; the points are shown here. I have marked it on this map with a red cross. I am familiar with the lands leased to the Huntington Company. On this map they lie to the east of a granite monument shown on East Neck on this map and having a frontage on the bay of about 1,200 feet—from 1,200 to 1,500 feet. I know the location of Mrs. Baldwin's place, but I do not know as to the particular location. From the description I could find it. I know about the location of this dock that once stood on East Neck under that lease. The location is where this granite monument stands or close to it—I mean the monument at the head of Huntington Bay. I know the location of the lands in the lease to N. S. Ackerly for gravel purposes. They are located on the west side of West Beach, as shown here. They extend along the whole front of West Beach.

Q. The description in the Baldwin deed is:

"Commencing at a point where the land of said Abbie A. Baldwin joins the land of Gilbert Bronson at the east line of high-water mark and thence northerly at right angles with the shore of Huntington Bay fifty feet, and thence westerly all the way in a line fifty feet out from ordinary high-water mark opposite where the east side of the road or public highway comes down to the shore, known
148 as Bay View avenue; thence southerly along a course at right angles with the shore fifty feet to ordinary high-water mark, and thence easterly along the line of said high-water mark and along the upland of said Abbie A. Baldwin to the place of beginning, being a strip of land under tide water fifty feet out." I recognize that it is located between the confines of 92 and lot No. 112, as shown on this map. I know the Eckerson brick-yard property that is on the map to the east of lot No. 3, as shown on this map.

JONAS S. HIGHBEE, witness for the plaintiff, being duly sworn, testifies:

By Mr. ACKERLY:

I reside at Northport, Long Island. I am sixty-eight years of age; my residence has been at Centerport and Northport, Suffolk county, Long Island. My business has been master mariner. I have sailed as master of a vessel. I have sailed anywhere from Penobscot river, in Maine, to the River Rio Grande, in Texas, and through the Caribbean and West Indies. I have been a good deal of the time on the Long Island Sound. I have run a sailing vessel through Long Island Sound. I ran a packet from New York to Northport. I have planted oysters. I was employed by N. S. Ackerly to take charge of his gravel business at West Beach. I was in that business in the neighborhood of a year. I don't remember exactly how long. That is close by Huntington Bay—adjoining Huntington Bay. Huntington Bay has been the harbor or haven for vessels always, as far as my knowledge extends.

149 There is more vessels that go to Huntington Bay in the approach of a storm or in actual storm than all other ports on Long Island Sound. I should say I had seen as many as a hundred there at one time, coming in there for refuge and harbor in time of storm. That body of water has been named Huntington Bay always. My father was eighty years old when he died—eighty. He has been dead twelve years. I have heard him speak of it always as Huntington Bay.

Cross-examined by counsel for defendant.

By Mr. KEOGH:

I live in the town of Huntington. I am engaged in the oyster business to some extent. Lloyd's Harbor opens off Huntington Bay; Huntington Bay is on the east side of Lloyd's Harbor; that is a good harbor for small vessels—a very good harbor. After you enter Huntington Bay you would sail about three miles before you would reach the mouth of Lloyd's Harbor. Centreport Harbor is on the southeast side of Huntington Bay; it isn't on the same side as Lloyd's Harbor. That is a good harbor for small vessels. You would sail about three miles and a half into Huntington Bay before you would reach the mouth of Centreport Harbor. Huntington Harbor opens off of Huntington Bay; it is another harbor. You would sail into and up Huntington Bay before you reached the mouth of that harbor; about the same distance as Lloyd's Harbor—about three miles. I wish to correct myself with regard to Centreport. Centreport Harbor doesn't enter from the bay, but it enters from Northport Harbor or Bay. Northport Harbor opens off from Huntington Bay. That is a very good harbor for small ves-

150 sels—any size vessels; it is landlocked and a very good harbor. You sail about three miles in from the sound up Huntington Bay before you reach the mouth of Northport Harbor. I should say it would be safe to anchor in Huntington Bay with a gale blowing

from the north. I would not anchor an oyster vessel in Huntington Bay with the wind blowing a gale from the north. I would anchor a vessel in Huntington Bay, with the wind blowing a gale from the north, if I had a large vessel. The size of a vessel that would be safe to anchor there is one hundred tons. I mean one hundred tons registered tonnage. It would be safe to anchor an ordinary sloop in Huntington Bay with the wind blowing a gale from the north—an ordinary oyster vessel. It would be safe to anchor such a vessel in Huntington Bay with the wind blowing a gale from the north. I would not anchor an oyster vessel there with the wind blowing a gale from the north. I know Mr. S. R. Robins; I think he was a resident of the town of Huntington in 1882 or 1883. He has been a resident of the town of Huntington since 1880. I cannot say whether he was at any time engaged in the oyster business in that town; I think so. I know Andrew Ackerly, of that town. He has been a resident of that town since 1880. He has been engaged in the oyster business in the town of Huntington.

Redirect by counsel for plaintiff.

By Mr. ACKERLY:

I know that there was a dock at the head of Huntington Bay; at one time a steamboat dock; it was used for quite a number
151 of years. It extended out into the water so that a steamboat could go to it at all times of the tide.

Recross by counsel for defendant:

This dock that I speak of was about the center of the head of the bay—the southerly end of Huntington Bay, the extreme southerly end. I know whether that dock extended beyond high-water mark or not. It extended far beyond, so that the steamboat always went to it at low water, about one hundred feet beyond low-water mark.

By Mr. ACKERLY:

Q. Did you run the steamboat there?
A. No, sir; I was a passenger often on one.

JOSEPH A. SCUDDER, witness called on behalf of the plaintiff, being duly sworn, testifies:

By Mr. ACKERLY:

I reside at Northport. I have made it my home there all my days. I am in the neighborhood of seventy-seven years old. I have been familiar all my younger days with the waters between Eaton's Neck and Lloyd's Neck and East Neck. They have always been called Huntington Bay. In my younger days I followed boating and coasting. I went boating. I had occasion to go out and in over these waters every week during all my life. I have lived so that I saw them once in awhile; could see vessels there. This bay,

in my recollection, has always been used by vessels for a harbor—anchoring, and so on. When they would use it for a harbor they would anchor there for shelter against heavy winds. It has always been used for that as long as I can recollect. I have seen vessels there when they lay so thick that when I undertook to count
152 them I couldn't count them, because I couldn't see through them to count. There would be so many that I couldn't count them. If I had had smooth water to have gone around, I suppose, and count each vessel, I could have done it. To look out through it looked like a mass of trees.

Cross-examined by Mr. KEOGH:

I have never been a sea-faring man outside. I don't mean by outside on the sound, I mean on the ocean. I have been in charge of a coasting vessel I couldn't tell how long ago. That was, perhaps, twenty-five years old I might have been at that time. Within the past twenty-five or thirty years I have had charge of a vessel or been employed on the water or worked on the water. I never have had charge in any vessel in that time, but I have been on the water all the time round—boating. I have been there sometimes for amusement and some outside in the sound fishing with a small sloop during the summer months. I have not during the last twenty-five or thirty years followed the water for a living in big vessels, as watermen say. I have not followed the water for a living in any kind of vessels during the last twenty-five years. I live in Northport. From where I used to live I guess West Beach would hide the bay so you couldn't see the water from where I used to live; but you could see over West Beach to Lloyd's Harbor or Lloyd's Neck light. I could see across the bay to Lloyd's Neck during the last *last* twenty-five years. I could see from where I lived in Northport vessels anchored in Huntington Bay with-
153 out going on the water.

Q. And when you speak of seeing vessels there you refer to that, to seeing them from your house, and seeing them from the land at Northport?

A. When I couldn't count them you mean?

Q. Yes.

A. Nearer by than that, I guess. I often come—sometimes every week—from there to Lloyd's Harbor in a small boat. I have to cross Huntington Bay to go to Lloyd's Harbor. There is a light at the entrance to Lloyd's Harbor. The light is used to show the way into Lloyd's Harbor at night, I suppose—to show the harbor at night, I suppose.

Redirect by counsel for plaintiff.

By Mr. ACKERLY:

The last twenty-five years I have followed the bay, oystering and fishing; that called me over all the waters of Northport Bay and Huntington Bay and Lloyd's Harbor often; sometimes twice a week.

CORNELIUS SUYDAM, a witness called on behalf of plaintiff, being duly sworn, testifies:

By Mr. ACKERLY:

I reside at Centerport. I am seventy years old. I have resided there all my life. My business is boating, chiefly over the waters of Long Island Sound. I am familiar, and have been from my boyhood, with the waters between Lloyd's Neck and East Neck. They have always been called Huntington Bay; the uses that have been made of that bay for vessels is to come there for a harbor to anchor,
154 to the extent that sometimes in a severe northeaster there will be a hundred in there at once anchored; this has been the case from my earliest recollection.

DEXTER K. COLE, a witness called on behalf of the plaintiff, testifies:

By Mr. ACKERLY:

I reside at Northport. I am an oysterman.

Q. How long have you followed it?

A. Twenty or thirty years. I have been familiar with the waters of Huntington Bay fifteen or twenty years. I have had oyster grounds there, I think, about twelve years. I had occasion to work them frequently and to be there. This bay was used as a harbor or refuge for vessels. I think I have seen a fleet; probably from twenty-five to fifty or a hundred might be there; I couldn't say; I never counted them. Very extensive in numbers anchored there.

Q. And during what period of time—what time during the whole of this period of time that you have been familiar with the bay, different times?

A. Yes, sir.

EDWARD THOMPSON, a witness called on behalf of the plaintiff, testifies:

By Mr. ACKERLY:

I reside at Northport. I am familiar with the location of the oyster grounds leased by Charles Haines; the first lease of 1882.
155 Q. About where are those grounds on this map (showing chart to witness)—the first lease, I mean, of 1882?

A. About lots 110 and 111, I should say about there. I have known him to plant and cultivate oysters — work the lot. I am familiar with the location of the grounds leased to him in 1888, I think it was.

Q. Where are they—about?

A. (Indicating on same chart.) That lot, 100 or 104, 103, 106, and so on, I have known him to cultivate oysters there, occupying the grounds for that purpose. I am familiar with the lands that were leased to you and myself; they are on the east side of the bay; it has been cultivated extensively. I am familiar with the location of the oyster-bed of Dexter K. Cole; that has been cultivated exten-

sively, and also the one leased to Moulford; I have know- him to cultivate it—that is, his assignee. I know about where the grounds are located in question in this suit. They are about off—about that line there (indicating on the chart); somewheres around lots 86 and 88, 89 and 87; they — all south of this line of these two monuments given here by Oscar Darling as being the narrowest point in the bay. I have been familiar with the waters of Huntington Bay about fifteen years—fifteen or twenty. I have known it to be used as a harbor, a haven for vessels at anchor at times of storm, making a harbor there at night.

Cross-examination by counsel for defendant.

By Mr. KEOGH:

I am an oysterman to some extent; I am to some extent;
156 that is not my sole business. I am also in the law-book publishing business. I am not a lawyer—law-book publisher. I got one lease of land from the trustees in Huntington Bay. I got that direct from the trustees; that was 1888, I believe, the one that the counsel got; I bought it of him and sold it again. I am not an oyster broker. I have owned vessels and sold a good many of them; own some now; there is no other business that I am engaged in. We do not practice medicine down there at all; it is wholesome food we practice.

ANDREW ACKERLY, a witness called on behalf of the plaintiff, being duly sworn, testifies:

By Mr. ACKERLY:

I reside at Northport; I am forty-three years old; I am a brother of yours. My business is oysterman; I have been in that business twenty-five or thirty years. My younger days before that I was a farmer; I used to go on the water; I sailed between Boston and New York, Albany—out of Huntington Bay some. During a great part of this time that I have lived there at Northport I have lived near by Huntington Bay; I could see it—see over there were vessels anchored there; it has been used by vessels as a harbor anchorage in bad weather for the last few years. I have a steam oyster-boat. I have had occasion to go out and in there a great deal. I have an interest in the grounds on Long Island Sound, and to a large extent I have seen this used as a harbor.

157 Cross-examined by counsel for defendant.

By Mr. KEOGH:

I am a brother of Mr. N. S. Ackerly. I have lived in the town of Huntington all my days. I was the defendant in an action brought by Seth R. Robins. Mr. Robins lived in the own of Huntington when the action was commenced.

Q. Who was your attorney in that action?

Objected to by Mr. Ackerly as immaterial.

Objection sustained. Defendant excepts.

I had an oyster bed in Northport Harbor. I had an oyster bed in Northport Harbor in 1881 or 1882 or 1883. I got the lease of that bed from the trustees of the town of Huntington. I don't think that was before this action was brought, the action of Robbins. That is the best of my recollection. I can't say what is the oldest lease that I have from the trustees of the town of Huntington in Northport Harbor; about ten years, I think. I don't think I had any leases of lands under water in Northport Bay when the Robbins action was brought. I think I had none. I couldn't say that I had any leases from the town of lands in Northport Harbor up to 1884.

I don't think I had any lease till after this action. I don't think I did, till after the Robbins action; possibly I might have.

JAMES H. SMITH, a witness called on behalf of plaintiff, being duly sworn, testified as follows:

By Mr. ACKERLY:

158 I reside at Centerport. I have followed the water formerly. I am about fifty-one years of age. I have had occasion to go out and in over Huntington Bay frequently. It is used as a harbor against gales; likewise as a shelter in foggy weather, to get out of the passage of steamers while they are passing up and down the sound, and likewise for tows in heavy southwesters that meet a heavy sea. When I say used by these vessels I mean anchored there; it has been so used frequently.

No cross-examination.

Mr. ACKERLY: I now offer in evidence a copy of a notice which it is admitted by the defendants has been served upon them on the 23rd day of May, 1888, at Norwalk, Conn. It is as follows:

"You will please take notice that the Board of Trustees of the Town of Huntington hereby give you notice not to put or plant any oysters on any lands under the waters of Huntington Bay, town of Huntington, Suffolk county, and that they also demand and request you to take up and remove all oysters planted or claimed by you or in which you are interested now on such lands; that they desire to lease said lands to parties applying and who have applied therefor for oyster cultivation. You are further notified that said board are willing to give you a hearing on your request as to what length of time is a reasonable and necessary one for you to remove such oysters as you may now have thereon or are interested in from such lands."

Served on the 23rd day of May, 1888.

The paper is received in evidence and marked Plaintiff's Exhibit No. 83.

Plaintiff rests.

159 Mr. Keogh opened the case to the jury on behalf of defendant and called as a witness—

AUGUSTUS B. ST. JOHN, who, being duly sworn, testified as follows:

By Mr. KEOGH:

My business is master mariner. I am now master of the vessel Eva L. Ferris, plying between Norfolk and New Haven at present—Norfolk, Va., and New Haven at present. I have followed the sea forty years. I have been engaged in navigating vessels up and down Long Island Sound thirty-one years—master. I am familiar with Long Island Sound and its bays. I know Huntington Bay; Huntington Bay is what we masters of vessels call a lee or a shelter with the wind from northeast to west, southwest via the south. I mean by lee or shelter a point of land extending into the sea where we may get under and anchor for a time when the wind is blowing from the landward. A haven, as understood by mariners, is a place landlocked—secure from all storms and winds. Huntington Bay is not a harbor when the wind is blowing north-northeats and north-northwest via the north. The purpose vessels may anchor in the bend of Huntington Bay for is to be out of the thoroughfare of steamers passing. Other portions of the sound has often been used for the same purpose, such as a lee; other portions of the sound that have been used for that purpose are Lloyd's Neck, Crane Neck, anywhere along the south shore, with the wind from the southward-southeasterly. I have known vessels, when going east, with a storm approaching, when near Huntington Bay to return to seek a harbor; they return to Hart Island.

160 Q. That is opposite the shores of Westchester county?

A. I don't know anything about the county.

—. How far frow New York city?

A. Eighteen miles from New York city. The distance from Huntington Bay to Brooklyn or the East river is thirty-five to thirty-seven miles.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

Those vessels return to Hart Island from Long Island Sound—the middle of the sound. I have returned from Huntington Bay to Hart Island. I have seen a large number of vessels in Huntington Bay anchored there; not often. I don't pass there so often. When I have seen them anchored they have been there for shelter. I am not familiar with the Cold Spring Harbor. I know where it lies; it lies west of Huntington Bay. I should judge, six or seven miles; I am not familiar with it. I am familiar with Hempstead Bay. Hempstead Bay isn't a good harbor; it is used as a lee; vessels anchor there not extensively. I am familiar with this book, the Report of the United States Coast Pilot, Atlantic Coast.

Q. (Reading description of Huntington Bay from the book in question.) What do you say about this: "The bay is a large bay on the southeast shore of Long Island Sound, just to the westward of Eaton's Neck; is an excellent anchorage, with 18 feet to 6 fathomas of water. The entrance to the bay is between Eaton's Point on the

east and Lloyd's Point on the west. The bay is about two
161 and a half miles long in a north and south direction and is about one mile wide abreast West Beach (now called Port Eaton). Vessels of the largest size anchor in Huntington Bay for shelter, the bay being protected against all but northerly winds. In bad weather it is frequently used by the large sound steamers, both in summer and winter." Is that true?

A. Yes, sir.

Redirect by counsel for defendant:

I laid there once in the Empire State, in 1858. There was a severe storm from the eastward, and the wind came from the northward, and I know we were in a hurry to get out. We left it, we were obliged to leave it. The steamer went to Fall River. We were obliged to leave it because it got so rough there passengers began to get seasick.

By Mr. PLATT:

It was that part of Huntington Bay that they call the bluff. I can't tell you what bluff. I wasn't captain of the boat; I was only a passenger. I was not seasick; it would take a great deal to make me seasick. I understood the captain to say we were anchored under the bluff. I have no way of telling particularly how often I anchored in Huntington Bay—maybe a hundred times in my life—within thirty odd-years for shelter, in case of storm.

THEODORE LOWNDES, defendant, being duly sworn on his own behalf, testifies:

By Mr. KEOGH:

I am the defendant in this action. I now live in the State of Connecticut, town of Norwalk; that is nearly
162 opposite Huntington. I formerly did live in the town of Huntington. To the best of my knowledge, it was in 1844 that my father moved from Harlem there and took his family with him—me and my brothers. I lived in Huntington when I was a boy, with my father, for the lapse of ten years, the first time; then I come back there again in 1857—back to Huntington. I lived on City Island in the interval, and sometimes I would go back and forth to Connecticut, City Island, in Westchester county. I returned to Huntington in April, 1857, and lived there until October, 1866, and then moved to City Island again. I remained there, I think, six years. I won't be positive; five or six years. I then moved to the State of Connecticut, I think it was in 1872, about 1872—seventeen years ago. My business is oysterman from my boyhood up. My father was an oysterman before me, one of the first ones on the East River. My brothers are engaged in that business, and my nephews. I am still engaged in the oyster business. I know Huntington Bay and Northport Harbor thoroughly, Huntington Harbor and Lloyd's Harbor. All the harbors which you have mentioned open off of

Huntington Bay—Lloyd's, Northport, and Huntington. Centerport is inland from Centerport Bay; it is still a continuation of the waters of the bay. I came from City Island in the latter part of July or August, 1866, aboard of my brother's, John H. Lowndes', sloop. We tried the ground outside, on the south part of Huntington Bay, outside the beach, and we found it covered with sea stars and covered with refuse of nineteen hundred years. We put our buoys down to designate the locality that we were to occupy, and after we had
163 tried a little more we thought it was unfit to occupy and we pulled up some of the buoys, and some of the brothers suggested that we let the buoys lay, and we did. In the fall of 1867 John Lowndes planted oysters there in the bay.

By the COURT:

Q. At *what* place?

A. Yes, sir; I let my ground be buoyed for one year. I didn't occupy it. In 1867 I planted. John Lowndes planted one year ahead of me—1866.

By Mr. KEOGH: When I planted I went to Connecticut shore or elsewhere, wherever I could buy oysters and brought them there with my vessel and threw them overboard, the same as a farmer would scatter his seed, with the purpose that they might mature and be fit to sell at market. In trying the ground I did not find any natural oysters growing there; not a natural oyster. We found these stars and the accumulation of nineteen hundred years. The sea stars ate up three crops of oysters for me—two wholly and a part of the third. Before I planted my seed I cleaned it up and took the sea stars off and the rubbish that was onto it and put it in a condition to plant. This was in Huntington Bay—the southerly portion of Huntington Bay—just opposite the beach.

Q. What beach do you and the other witnesses speak of there?

A. On East Neck, between Lloyd's Harbor and Centerport Bay. And I would say further, with the permission of the court, the thirteenth of May, 1861, Captain Jonas Higby, myself, and a man
164 by the name of Mortimer Fox and Gilbert Scudder went out there and tried the ground and found it unfit for our purpose, and went inside of Northport Bay and staked off their ground and occupied it. This was in 1861. We tried it before 1866; yes, sir. After I had planted this ground I continued to plant it up to the present time. As fast as the oysters would mature I would ship the biggest ones and sell them and replace them with small seed from my boat over in the Connecticut limit. I have used the lot principally as a transplanting ground for the purpose of developing. I have kept the ground staked out from 1866 to the present time with buoys. The town first requested me to leave there, I think it was the latter part of the summer; a year ago this last summer that is passed; about the summer of 1888.

Q. About how many men work on the grounds year after year in cultivating oysters and transplanting on your ground?

A. It is according to the market I have. Sometimes I would have more than I could do with my own vessel and I have hired

other vessels to come there and help me. I have in the neighborhood of twelve men and sometimes two or three vessels. Two or three vessels I worked there openly day after day, year after year. I never done no night work. I always done it above board. I did it in full view of the inhabitants of Huntington, and some of them were aboard of my vessel. Well, from the Connecticut shore to the New York shore, a direct line from Norwalk Island Light to Eaton's Neck, I should think was in the neighborhood of six and a half or seven miles, the width of the sound at entrance of Hunting-
165 ton Bay.

Q. And what about some sweep or bend in the sound?

A. With a northwest draft from Shippan Point, in the neighborhood of eleven miles from the Connecticut shore, on Long Island shore.

Q. And what is the depth of Huntington Harbor proper from Eaton's Neck to its most southerly extremity—Huntington Bay, I mean?

A. Well, I couldn't tell; no more than —, I should judge, to the best of my knowledge.

Q. I don't mean the depth of water; I mean the length.

A. I should think in the neighborhood of three miles or three and a half in length.

Q. And Huntington Bay proper ends on the land of the town of Huntington?

A. East Neck; yes, sir.

Cross-examined by Mr. ACKERLY:

Q. Was this bay cleaned up nineteen hundred years ago, that you know of?

A. I don't know of anything. I suppose the refuse was on it. It showed the indication of it.

Q. What did you mean by nineteen hundred years?

A. Because there was never anybody that occupied there, from the appearance of the bottom, for nineteen hundred years.

Q. Had there been from the ages of the world, that you know of?

A. You go past nineteen hundred years, to the ages of the
166 world.

Q. You take it from the Christian era, then? You assume it was cleared up before then?

The COURT: Is that material?

Mr. ACKERLY: No; not material; but I thought I would call the attention of the witness to his testimony.

Q. How much ground do you occupy in Huntington Bay, about?

A. That I couldn't come at closely; I should think in the neighborhood of 125 or 130 acres. I was sworn as a witness on the trial of Stanley H. Lowndes. I was sworn as a witness. I didn't say then that I occupied 300 acres. I said the ground that was staked was from four to six hundred acres; the whole party—the Lowndes brothers. I occupy now about 125 or 130 acres, I think. I never

measured it. That is the best of my knowledge. I reside now in South Norwalk, Conn. I have resided there twelve years, I think.

Q. How many oysters do you probably plant to an acre?

A. That is according to the quality, of course. On the average, if the oysters are clean, I would plant, probably, four or five hundred bushels to an acre, and if they were dirty I would plant more. I do not know how many acres I planted on this ground in 1867. I never kept any account. I didn't plant five thousand bushels, sir. I did not plant four thousand bushels. Did I plant three thousand bushels is what I couldn't tell you. I know I didn't plant five or four. I cannot tell how many I planted there in the year
167 1868. It is quite likely that I planted 5,000 bushels there that year. I couldn't swear that I planted 6,000 in 1868. I don't think I planted 5,000 in 1868. I might have planted somewhere in *that* neighborhood of 3,000—from 2,500 to 3,000. I did not use steam from 1860 to 1870 in the oyster business at all to any extent. I had no steam-vessels at work on this ground during that time. I had my own vessel at work there in 1867. When I cleaned up I had no other that I know of; don't recollect. I can't tell how many vessels I did have there in the year 1868. I can't tell whether I had any more than my own there or not. I had other oyster lots in the years 1867 and 1868 in Westchester county. I did not have my vessels at work part of the time. In the winter time I worked down there on the other lands; that was so in 1868. I took these lands and occupied them—examined them—as I understand I had a right to do if I didn't find a natural growth of oysters there; that is the claim under which I went there and planted oysters, that there was no natural growth of oysters there. (Showing paper.) That is my handwriting—the signature, I mean, *it* is. I gave the description in here to Mr. Doyle, the clerk of the fish commission.

Mr. ACKERLY: I propose to offer this paper in evidence. It is an application of Theodore S. Lowndes for a franchise, to the fish commissioners of the State of New York, of grounds in Long Island Sound, Huntington Bay.

168 The paper is received in evidence and marked Plaintiff's Exhibit No. 84.

*Application of Theodore Lowndes to the Commissioners of Fisheries of the State of New York.*

The application of Theodore S. Lowndes, a resident of the town of Norwalk, in the county of Fairfield and State of Connecticut, respectfully shows that he resided in the State of New York at the time he staked in and occupied the lots hereinafter described; that the grounds hereinafter described are not and for ten years last past have not been natural oyster beds, and have not been designated according to the provisions of the act hereinafter mentioned as natural oyster beds; that he wishes and intends to use said grounds for planting and cul*it*vating shell fish; that he does not own a franchise for oyster cultivation, directly or indirectly,

on any other ground under water which with that hereby applied for will exceed two hundred and fifty acres.

That he has been in the actual occupation and use of said lands in planting and cultivating shell fish for at least twenty years before the date of this application.

He therefore respectfully requests that said commissioners, pursuant to an act entitled "An act to promote and protect the
169 cultivation of shell fish," passed by the Legislature of New York June 16, 1887, will grant to him, in the name and behalf of the State of New York, a perpetual franchise for planting and cultivating shell fish in —— acres of ground located under the waters of the State in Long Island Sound (Huntington Bay), in the State aforesaid, which grounds are more particularly bounded and described as follows, to wit:

Beginning at a point near the piles of the old East Neck dock, opposite Titus Conklin's house, and running north to the mud bottom, and thence westerly to a range of a tree on Hog Island seen through Lloyd's Harbor, and then southerly in range of monument set on shore; thence easterly along shore to place of beginning.

Dated at New York this 10th day of October, A. D. 1887.

THEO. S. LOWNDES, *Applicant.*

Sworn to before me this 10th day of October, 1887.

—— ——.

The lands described in that exhibit are the lands embraced in this suit. These are the lands I occupy now. I did not get any grant on that application. The town put in a demur-er. When I commenced to plant oysters on these grounds I claimed that the bottoms were owned by the State. I do yet. I don't claim to own the ground at all. In the year 1867 I planted probably—well, I never measured. I staked off a square what I thought would be
170 competent to hold 3,000 bushels or 2,500, the amount I had money enough to buy and plant it onto it, indiscriminate of the number of acres. I didn't plant more than three thousand bushels then. I did not plant more than ten acres in 1867. I don't think I planted more than ten acres in 1868.

Redirect by counsel for defendant.

By Mr. KEOGH:

When this new law was passed, in 1887, creating the fish commissioners in this State of New York a large number of oystermen who had grounds made application for a franchise to the commissioners. It was the custom among the oystermen who had been occupying these grounds in this State to make application for a franchise.

Mr. KEOGH: I now offer in evidence that part of the record of the town trustees which contains the report of the counsel of the town of the proceedings of these fish commissioners upon that application. I will give the page and book at a later stage.

171 Q. Do you remember Mr. Scudder and some residents of the town of Huntington, including, I believe, some trustees, going out on the bay a certain year; and, if so, when was that, and what happened?

A. I wasn't there.

Q. You were not present at that time?

A. No, sir; Mr. Joshua Devoe was the gentleman who had them out on the bay.

Q. He is here?

A. No, sir; he is sick at home, in Huntington. He took them out in the inner bay and showed them the grounds there.

STEPHEN D. HORTON, a witness called on behalf of defendant, being duly sworn, testifies:

By Mr. KEOGH:

I live on City Island, in Westchester county, of this State. I have lived there all my life. I am a Hell Gate pilot. I have been a pilot—I have *have* had a branch—forty-eight years. I have been in the business fifty-two years the tenth of next May. I have had a branch, you know, for forty-eight years. We get our appointment from the Government, and I got that about forty-eight years ago—forty-eight years this coming spring.

I have been continuously in the business from that time to this; never done anything else. I am now actively engaged in business as a pilot. I know Long Island Sound pretty well. I know its bays and harbors; all of them. I know Huntington Bay. I never have anchored into Huntington Bay in my life for a harbor. I have been constantly going night and day. I have anchored there
172 for a lee—for a shelter—or in case of fog to keep out of the track of steamers, but never in my life ever anchored there for a harbor. I will explain what I mean by anchoring there for a lee to the jury; maybe they can get at it a little better. The Government spend a great deal of money for the mouth of a harbor—for a breakwater. Long Island is a breakwater, with the wind to the southward or eastward, for Long Island Sound. That is all the way I can explain it, and I think that is the best way to explain it. Long Island shore itself furnishes a lee with the wind in certain directions. With the wind to the southward and eastward it is a good lee. The use I have seen Huntington Bay put to in my forty years' experience—I live on City Island, as I said before, and I have seen three or four hundred vessels laying there at City Island, and after two or three days the captains would get tired, and at the end of an easterly storm they work along in hopes of getting out; work along towards Huntington Bay. One fair tide will carry them down about as far as Huntington, and then they will go in there over night; then get under way, likely, in the morning and go along. When there is no wind they come in there to get out of the track of steamers. It could not be used for a harbor or haven on account of the shallowness of the water off Huntington, in the sound—off Huntington. When you are three miles from Huntington, in Long

Island Sound, the vessels that go down Long Island Sound—I went down Long Island Sound once since this trial has been on. I left at four o'clock yesterday and couldn't go within two or
173 three miles of Huntington along the sound. The condition of the bay when the wind is in certain directions is—the wind chops around. With the wind to the southward it chops around to the northward, and they go in there and anchor. At one time there were three vessels went ashore off Huntington. The Abbott Lawrence was one of them. I believe she rode it out. The other two went ashore. That was forty-two or forty-three years ago.

The kind of a harbor or refuge Huntington Bay would be for small vessels is that in the summer time they would lay there comfortable enough as long as it was calm or moderate, and if there was any breeze at all they would either get into Lloyd's Harbor or into Northport Harbor by all means. Get into Lloyd's Harbor or Northport Harbor it was necessary to sail in through Huntington Bay; right through the bay.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

I have never anchored with a vessel in Huntington Bay. I have anchored with a pilot boat, but never with a vessel. I have anchored there with a pilot boat maybe half a dozen times. We used to have schooners of thirty tons; maybe twenty-five or thirty years since I used them. I now use a row-boat. I have been ashore twice at Eaton's Neck light-house in twelve years. I was up at the light. I walked up to the light. I was there at the life-saving station, not at the light-house. I went to Eaton's Neck. I have been there on an average in a year around about every two or three weeks.
174 I go up on the Connecticut side; follow the Connecticut side. The Coast Survey map properly represents the depth of the water in Huntington Bay between Burlington and Connecticut pretty well.

Q. Will you look at it and show us what depth of water there is off Huntington Bay?

A. I don't want to look at it. I know without looking. I know it better than they do. The depth about the mouth of the bay is about seventeen feet or seventeen and a half; that is right off about Huntington, right about outside the buoy; a mile outside the buoy. That is out in Long Island Sound; a long distance out of the buoy; is out from Huntington one mile, sir; one mile from Eaton's Neck. Well, there is rocks enough out there so I don't want to go out in a ship. I found three or four myself in the last year or two that isn't laid down in that chart at all. I have seen at times, I think, fifty vessels anchored in Huntington Bay. There are as many as that maybe half a dozen times a year not during a storm. I have seen a scattering one or two in a storm, but most generally in a fog. That is the time they anchor there. I was passing there when I saw them during this northeast storm. I was not in a row-boat. I don't row in a storm. During this northeast storm I was going by in a steam-

boat. We tow in a steamboat. I might have been a mile or a mile and a half from shore. I found water enough within a mile from shore for a steamboat drawing six feet; but there is some difference between six feet and twenty-four, I want you to understand. That was the draft of the ship I went down in the sound with
175 yesterday. I am acquainted up in Northport Bay. I am well acquainted with Huntington Bay, but in Northport Harbor I am not well acquainted. I know all about Huntington Bay, but I don't know anything about Huntington Harbor. I consider a bay an indentation of land like Crane Neck Bend or Smithtown Bay. I have seen as many vessels laying in Crane Neck Bend as I ever saw at Huntington. That is what I consider a bay. That is a pretty good representation of a bay from Crane Neck up to Eaton's Neck, in my opinion.

GEORGE W. HORTON, a witness called on behalf of defendant, being duly sworn, testifies:

By Mr. KEOGH:

I live also on City Island. I am a brother of the last witness. My business is Hell Gate pilot. I have been a Hell Gate pilot about thirty-eight years. I know Long Island Sound and its bays and harbors. I know Huntington Bay. I have known that bay for forty-five years. I have been in there. It is used by ships and vessels passing up and down Long Island Sound for shelter with the wind from the northeast around the southern board to west-northwest, and no other. It would be very dangerous to use it with the wind from other points, because the wind blowing right in with about eleven or twelve miles rake—I mean the sound eleven or twelve miles across with the wind north-northwest—the effect of it is, as to driving the vessel *is*, it might drive ashore. If they had good ground tackle they would hold on; if not, they wouldn't. Other portions of Long Island Sound — been used for a lee or shelter with the wind in the same direction as I refer to—
176 Hempstead Bay, Smithtown Bay, Horton's Point, Block Point Bay, Bridgeport Bay, New Haven Bay, and quite a number of other bays. But Huntington Bay and those bays to which I refer only shelter a vessel when the wind is blowing from the eastern board, eastern and southern board, the only shelter. I have seen it used by vessels who anchored to get out of the track of steamers when in a calm and waiting for wind sheer in, on account of the shoalness of the water and fog. I have seen it used in a storm as a harbor by from five to fifty vessels there at one time. The wind was blowing then from northeast around to southeast.

Cross-examined by counsel for plaintiff:

If vessels run away up, clear in there, small vessels, with the wind northwest they might get in there to make a little shelter. They most always, those small vessels, go into Lloyd's Harbor and Northport. That is a place of shelter from a northwest wind, but there is no water there.

Q. Is there any wind except a northerly wind that will trouble vessels in Huntington Bay? Won't they find a shelter and a harbor there from every wind except a northerly wind?

A. For what kind of vessels?

Q. That usually coast on Long Island Sound.

A. Oyster boats?

Q. That usually coast on Long Island Sound.

A. No, sir.

Q. You refer to oyster vessels?

A. Small vessels.

177 JOHN H. LOWNDES, a witness called on behalf of defendant, being duly sworn, testifies:

By Mr. KEOGH:

I live in the State of Connecticut, Bridgeport. I am a brother of the defendant, Theodore Lowndes. I am engaged in the oyster business, and have been engaged in it all my life, since I was a boy up. My family lived in the town of Huntington, on Long Island. My father moved there in 1844. I know Huntington Bay and the harbors opening out of it, such as Lloyd's Harbor, Centerport Harbor, Huntington Bay; you know these waters. I have known Huntington Bay since 1845. I first became acquainted with these waters by going in and out of there when my father lived there and going one place and another oystering, and coming back Saturday afternoon or Saturdays. I work with my brother, not with my father. In 1866 my brother and me went there and buoyed it out and searched it, and I planted some oysters there in the fall of 1866; that was along the south shore of Huntington Bay. I mean by searching the ground that we tried with the dredge for the purpose of seeing what was on the bottom. We found trash of all kinds that usually occur in Long Island Sound, and these stars. I did not find any natural oysters or clams. We buoyed it first, I think, in July or August, and then searched it the same day. We were all together aboard of one boat. My brother Theodore staked off and searched his grounds the same time. I think he planted the year after. His grounds are west of mine. I think he dredged under his
178 grounds before he planted it and cleared it off. I saw him do it. It was done by dredging the refuse which he obtained in the bottom; he took off and threw it overboard in the bay. The Bridgeport bed came out that year, and he bought oysters when I was there, and I saw him plant them. I mean it was discovered that year. He bought oysters there and caught oysters there and fetched them over in Huntington Bay and planted them. From that time onward every year from 1860 to 1870, and from 1870 to 1880, up to the present time, he has planted oysters yearly there, as far as I know. I have seen him there with his boat. I suppose he was planting oysters. I wasn't aboard the boat. We plant oysters, and when they mature and are large enough to sell we take them up and replant them again. Our ground principally is used for oyster business—exclusively for oyster business. Our branch of the

oyster business is for raising oysters and shipping to Europe and some to the New York market; and he transplants oysters, too; yes, sir. I don't know personally if the inhabitants and trustees of the town of Huntington knew this occupation by him so going on year after year. I know he went there in broad daylight and from day to day. Sometimes I had one vessel and he had one; the brothers had one each. He used to have, generally, three men aboard his boat beside myself, and I had four working there. We had from six to ten men there altogether and two or three vessels—two or three vessels and from six to ten men—and this was continued every year, openly, on the waters of Huntington Bay. I will describe that bay to the jury.

179 There is Lloyd's Neck, on the west, runs off, and Eaton's Neck on the east, and the water goes up in there for about three miles. That is Huntington Bay proper. Vessels anchor in there for a lee. Under Eaton's Neck, up in Huntington Bay, by anchoring there for a lee I mean Eaton's Neck projects off so that it breaks off an easterly wind, southeast and southwest under Lloyd's Neck, and there is a lee under there, but it — rough sometimes with the wind to the eastward, and with the wind to the northeast very rough. It affords a shelter with the wind from the points I mention. With the wind northwest and northerly it is a pretty rough place. I shouldn't judge it a safe place for a vessel—not for me it wouldn't be. In rough, bad weather there is a great many small vessels go into Lloyd's Harbor. Some that belong in Northport Harbor go in there, but I never seen strangers going in there. It is pretty hard getting out; the channel is narrow and the tide is stronger. I have not a certificate as a Hell Gate pilot. I have a license for a steam-vessel for navigating my own vessels up and down the sound.

Cross-examined by counsel for plaintiff:

By Mr. PLATT:

It takes a planted seed-oyster to mature for the market; oysters that we ship to Europe takes about three years—that is, if they are one year old till we plant them. It would take five years to grow large oysters. Oysters planted or oysters under the water don't have any power of locomotion, stay where they are, no more than a heavy sea sometimes will wash them, but of themselves they have no power of motion, and it is only when they are in shoal water that they are apt to be washed, not in deep water.

180 Q. You spoke about a northwest wind. How about a northeast wind, anchoring in Huntington Bay?

A. It is rough in there when it blows hard.

Q. Northeast?

A. Yes, sir; it is a shelter, but then it is rough there—that is, under Eaton's Neck, on either side, when the wind is northeast, on the eastern part of the bay. My bed is adjacent to my brother William's in Huntington Bay proper. The extent of the ground that I or my brother took up there I never had surveyed, but I should think from 75 to 100 acres. Of my own? Yes, sir. My brother

Theodore, I should judge, has full as much, if not more. I don't know; am not positive about that. My brother William, I don't think, has not got quite as much. My brother Charles, I should think, took up about the same. I only judge, that is all. Not Charles T. Lowndes, Jr., Charles Lowndes, my brother.

WILLIAM H. H. CLARK, a witness on behalf of defendant, being duly sworn, testifies:

By Mr. KEOGH:

I live in South Norwalk, Connecticut. I am in the employ of Mr. Lowndes. I have been in his employ nearly five years; in the capacity of master pilot of his steamer, which is used in the oyster business. I know Huntington Bay and Long Island Sound. Huntington Bay is a portion of the sound—a sort of an indenture, as you might say, from the sound. It runs in from the sound. There is a point runs off at each side, not straight in; makes a very wide mouth; narrows as it goes in to the shore of Long Island,
181 with harbors on either side. As a place of refuge in case of a storm, it would be according to how the wind was. If the wind was northeast it would make pretty heavy rowing there; southeast, possibly, if you go clear up, it would be pretty good. The reason why they do that it is good holding anchorage; the mud is good. That is the reason why they use it. In case the wind was north or northeast it is no harbor at all. You can't make harbor there. I have seen vessels lay there and have to slip their anchors and go inside. I have seen two wrecks there within the last three years. In certain winds it would make as good a shelter as Long Island Sound; no more, no less. It is no more of a shelter than Long Island Sound, as I tell you, except it is better holding land. As to the shelter of the land, there are plenty of others just the same. They call them bays—Smithtown Bay, for instance—which are easterly. Vessels would anchor there probably more than they would anywhere else, if it was good bottom. Smithtown Bay, from point to point, is about five to six miles probably.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

It is ten miles from Eaton's Neck to Crane Neck Point, if you call it all Smithtown Bay. I call Smithtown Bay from Crane Neck to Eaton's Neck, and call it ten miles. I don't think I ever saw fifty in there at a time. I possibly might have seen forty. I didn't count the vessels. I have anchored in Smithtown Bay. I never anchored in Huntington Bay in my life. The difference between the bottom of Smithtown Bay and Huntington Bay is, one is
182 hard and the other is soft. We anchored there because we got caught there with the tide and didn't want to go back. Smithtown is hard bottom where we anchored. The coast survey shows what kind of a bottom it is in places. That is all the difference I make the bottom. I have been in and out Cold Spring some. It would be used at times as a harbor if vessels happened to get there.

I suppose it is, portions of it. It would be a good harbor, as I say, with Eaton's Neck. Some winds it is good harbor; some it is not. I spoke of two wrecks in Huntington Bay. One of them was a barge loaded with brick. I think she went ashore during the blizzard. I don't know as she was fast to a tug-boat. I don't know whether she was cut loose from a tug-boat or not, for I didn't see it. I don't know whether tugs were anchored there during the blizzard; I heard so.

Q. You don't mean to say that these vessels that you speak of as being wrecked you testified to from hearsay?

A. One that I saw slip her chain myself was no hearsay; I saw it. The wreck lies there of the other- to show for themselves.

By a JUROR:

Q. Are there any other oyster beds in the bay besides defendant's?

A. There is.

Q. Who owns them?

The COURT: That is not for this witness to answer.

Q. The WITNESS: I can tell you who works there; but who owns them I don't know.

183 By Mr. ACKERLY:

I know about Northport Harbor. I have been there. We call it a good harbor. I never saw any vessels drift ashore in Northport Harbor. I don't know that they do not. This bed of Theodore Lowndes is in Huntington Bay.

SAMUEL PELL, a witness called on behalf of defendant, being duly sworn, testifies:

By Mr. KEOGH:

I live on City Island, in Westchester county, and have lived there about all my life about; yes, sir. I am in the oyster business. I have been engaged in the oyster business forty or fifty years on Long Island Sound. I know Long Island Sound from Bridgeport to Fort Schuyler pretty well. I know Huntington Bay. I think I can describe Huntington Bay to the jury. It is between two necks of land—Lloyd's Neck on the west and Eaton's Neck on the east. It is no harbor. On the southwest part of this bay there is a safe harbor called Lloyd's Harbor. It is for coasting vessels, and to make it proper for coasting vessels to go into this harbor the Government has built a light-house on the point of the beach for vessels to go in and out of this Lloyd's Harbor, which is a good harbor; but this bay or part of the sound, as you call it, is no harbor. Northport Harbor is quite a large bay, but the entrance to Northport Harbor is a little more difficult than to go into Lloyd's Harbor. This Northport Harbor is south of Eaton's Neck and Lloyd's Harbor is south of Lloyd's Neck. Oystermen — been in the habit of plant-

ing oysters in Long Island Sound off Huntington Bay, near
184 the entrance of Huntington Bay, for years and around it, Huntington Bay, on the outside. I believe residents of the county of Westchester, in State, have been in the habit of planting oysters off Huntington Bay—I think they did years ago. I know about the Lowndes brothers planting oysters in Huntington Bay. They were then residents of this State.

Q. To what extent did they plant oysters in Huntington Bay at that time when you knew of them planting—doing it? How largely were they engaged in planting there in Huntington Bay, this defendant, Theodore Lowndes?

A. Quite a large piece of ground that was in the waters of Huntington Bay. I have known them to be there planting oysters over thirty years; perhaps it is a little longer than that. I have known residents of this State to be planting oysters in Huntington Bay somewhere in the neighborhood of thirty-eight or forty years. I have known other residents of this State, excepting the Lowndes brothers, to be there planting oysters—Thomas and Lewis Jennings, a man by the name of Hegeman, and William Diller and G. W. Diller, Isaac Pell, and myself. Our grounds was in Northport Bay, off Little Neck Point. In Northport Harbor I planted for a number of years, but I haven't planted for this last eleven years; it is eleven years, now, since I planted oysters in Northport Harbor. I am not now actively in the oyster business.

These men—Hegeman, Jennings, and yourself—were all residents of Westchester county, in the State of New York?

By the COURT: His oysters were outside, in the mouth of the bay?

By Mr. KEOGH: No; they were all inside, in Northport
185 Harbor. It is somewheres between 38 and 40 years ago since you commenced planting oysters in Northport Harbor.

I have never lived in the town of Huntington. I always lived in Westchester county, in this State. Mr. Lowndes has been planting before I planted there; the defendant's father, of course. The other men—Hegeman and Jennings—planted before I did, and they have been continuously, and were residents of the State of New York when they did so plant.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

Q. Do you know that they are now held under lease from the town, in Northport Harbor? Do you know that leases are taken out in Northport Harbor now for all the grounds occupied for oyster purposes?

A. I understood so.

Q. (Showing map to witness.) Does that map correctly delineate Huntington Bay?

A. I don't know. I have got it all mapped out before me without a map.

Q. Look at that and see if it correctly delineates it, according to you- opinion.

A. (Witness examines map.) Yes, sir; that is a very good representation. I have been at Eaton's Neck or near Huntington Bay during storm-. I have seen vessels anchored in Huntington Bay a number of times. These people—Jennings and some other parties—all planted in Northport Harbor.

By Mr. PLATT:

I don't recollect of Mr. Jennings or any of them planting in Huntington Bay; all in Northport Harbor; Mr. Lowndes planted in Huntington Bay.

186 ABRAHAM DECKER, a witness called on behalf of defendant, being duly sworn, testifies:

By Mr. KEOGH:

I live in South Norwalk, Conn. I am in the oyster busines-. I have been master of a vessel ever since I was twenty-one years old, more or less. It might be sometimes a few months or so between, but generally. The vessels which I was in charge of plied up and down Long Island Sound and in and out of the harbors of Long Island Sound. I know Huntington Bay; I have known it twenty years—yes; over thirty years. That bay as a refuge in case of a storm is a lee with the wind on the eastern border—somewhat easterly and a little westerly, perhaps. On a northern border it ain't no harbor. I never anchored there, I don't think. The reason it isn't is because it is right open to the wind. There is a sweep across the sound from the Connecticut shore of ten or eleven miles, I should think, in the bay. Other portions of Long Island shore that give the same lee when the wind is in the same direction are Long Island shore, Lloyd's Neck—on the west side sometimes they anchor all along the shore—Crane Neck. Sometimes they anchor in Hempstead Harbor. They are all open to the sound with the wind to the northward. They all furnish the same shelter as this does, wind southerly, a little on the eastern or western board.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

I have been in Lloyd's Harbor during storms. I couldn't say I have been in Eaton's Neck. I have seen vessels anchored there in storms. I have seen quite a number.

187 LEANDER R. DEVOE, a witness called on behalf of defendant, being duly sworn, testifies:

By Mr. KEOGH:

I live in Centerport, the town of Huntington. I came there in the spring of 1867. I am now about thirty-eight years old. I have been with the Lowndes for the last twenty-eight years, more or less. Excuse me; for the last twenty-three years, since I have been there. I know Mr. Theodore Lowndes quite well. I know his grounds in

Huntington Bay. I don't remember when he staked them off. He owned them when I came there. He was working them when I came there, in 1867. He planted oysters and raised them and marketed them. I believe he transplanted oysters out there, too, and has been doing that from 1867 up to the present time. I don't know if there were any other persons planting oysters in Huntington Bay at that time but Mr. Lowndes. That is all I know of. There was a man by the name of Bennett owned some ground there, but whether he planted them or not I couldn't say, of City Island. I didn't see him working the ground. This Mr. Bennett might have been there three or four years afterwards. I don't really recollect what time he was there. Bennett was a resident of Westchester county, in this State.

Q. And does he still own the ground there?

Objected to. Objection sustained.

—. When Lowndes worked these grounds they had several vessels and several men at work there. When I first came there each one had a boat of his own.

Q. And Mr. Lowndes, in working his grounds, do you know if the fact was known to the residents and trustees of the
188 town of Huntington?

A. There was nothing to hinder it being known. It was a matter of common knowledge that he was working his grounds, and a matter of common discussion, and that has been the case since I came to the town of Huntington. I have never seen vessels slip their anchor in the bay. I have known them to do so. I know of one that slipped its anchor in particular. I know of some that drifted ashore in a storm when anchored in the bay. I know of three wrecks there and I know of several vessels that drifted ashore that didn't become wrecks.

Q. About how many vessels drifted ashore that didn't become wrecks? Name them, if you can.

A. About five or six years ago the schooner City of Elsworth, I think her name was, on West Beach, went ashore there, and about four years ago there was one slipped her anchor, the captain said, and had to come into Centerport. She jumped so hard, and the wind northwest, she come into Northport Harbor and so up into Centerport Harbor, and he beached her there. He let his anchors go to seek a harbor. There are others, sir, that I can't bring to my mind. In the blizzard there there was one come ashore, a schooner, Little Joe, I think her name was. There was a barge come ashore a total wreck. About seventeen years ago a schooner dragged in Huntington Bay loaded with coal; dragged across there and sunk. Her wreck in there to-day; and about four years ago, I think, this winter the Purvis, a schooner, loaded with oil, went ashore on the west side of Eaton's Neck, and she was a wreck. She lays there to-
day. The wind was northwest when she went ashore. I
189 don't remember any others at the present moment. The waters of the bay when the wind is blowing from the north are very rough, I should think; at least I call it so myself.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

I most forget where the Purvis was anchored when she went ashore. I couldn't say as to whether she was anchored off Lloyd's Neck. I don't know how this barge that was wrecked during the blizzard was fastened. I do not know whether she was fastened to a tug-boat.

Q. Do you know whether that schooner you speak about going ashore in the blizzard, also slipping her anchors, was in Smithtown Bay?

A. I don't know anything about it.

Q. Do you know it isn't so?

A. I don't know anything about it. Northport Bay is a pretty fair harbor. I have known vessels to drag ashore there. Numbers of them dragged ashore when the ice has shoved them ashore. Lloyd's Harbor is a pretty good harbor. I don't know of vessels dragging there exeept a little beyond in an easterly storm. I know the Pell C. Voit. I don't know about four years she was anchored there in a northeast storm. I don't know she went ashore there. I have seen a large number of vessels anchored in this bay. I never counted them. I should judge quite a number. I have not seen it so often. I have seen it six or seven times every year; very frequently a small number there; that is according to foggy weather; something like that. I have seen them there.

190 FRANCIS W. BELL, a witness for the defendant, being duly sworn, testifies:

By Mr. KEOGH:

I am what is known as a Hell Gate pilot—a United States steam pilot. I have been engaged in that business about twenty-four years. I am engaged in it at the present time. I pilot vessels through the sound. I know the sound and I know the bays off the sound. I know Huntington Bay. Huntington Bay is a sort of a V-shape bay, which puts in between Eaton's Neck and Lloyd's Neck; it is a shelter in some winds. I mean by that it is a shelter in a southerly wind or a southeaster. With the wind blowing at other points I don't consider it a very safe place for a harbor—in fact I know it isn't. I know it isn't by experience. My experience is, I have been there twice and had to get under way before I was ready to get out—before a northwester broke in on me. The wind at that time was west. Other portions of Long Island furnish the same shelter with the wind in the same direction; just the same. They are Smithtown Bay, under Crane Neck, Oldfield, Horton's Point, Hempstead Bay. Projections of the land itself furnish the same shelter. There is a sweep directly across the sound entering into Huntington Bay. I should think it was about eight or nine miles. Take it from a more northeasterly direction, I should think it was fifteen or eighteen miles, and with the wind from the north or northeast. From the Connecticut shore right up to the head of

the bay it would have that full sweep into the open bay of about
nine miles, I should think. From the northeast it would have
191 a sweep, as I said before, I should think, about fifteen miles.
When the wind was from these points I would *perfer* being under the Connecticut shore. The Connecticut shore itself, with the wind in that direction, would furnish the same lee that Huntington Harbor would with the wind from the south. The Connecticut shore furnishes a lee when the wind is northerly. Long Island shore furnishes a lee when the wind is southerly.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

I would rather be under the Connecticut shore in a heavy northerly wind.

—. (Showing map to witness.) Does that map about correctly delineate the outlines of Huntington Bay?

A. Well, no; I don't think it looks much like it. I don't think that is *not* very accurate.

Q. Tell the jury. Just explain to them just where that is inaccurate—where it does not correctly delineate Huntington Bay. Step down and show it to them.

The witness steps down with the map and explains what he believes to be the inaccuracies in the map in question.

Q. (Handing another map to witness.) Just look at that Coast Survey map and tell the jury where that is accurate.

A. I don't know as it is.

Q. Look at it and say what is your opinion of it.

A. That looks more like it. You see there is quite a difference in the space of the water here from that other map.

Q. Have you described all the differences?

A. As near as I can; yes, sir; yes, sir; vessels go in there;
192 not very extensively. I have seen vessels get under way and
go out of there and run into City Island to make a harbor. In my opinion Smithtown Bay is as good a harbor as Huntington Harbor, with a southerly and easterly wind. Take it generally, it is no harbor at all, either one of them. To some extent I consider the United States Coast Pilot of the Atlantic Coast, part 4, a reliable work—a standard work. There is lots of things about it, if you were navigating the waters, you would find they were wrong.

Q. It gives this description of Huntington Bay. What do you say about it? "This bay is a large bay on the southeast shore of Long Island Sound. Just to the westward of Eaton's Neck is an excellent anchorage, with 18 feet to 6 fathoms of water. The entrance to the bay is between Eaton's Point on the east and Lloyd's Point on the west. The bay is about two and a half miles long in a north and south direction and is about one mile wide abreast West Beach (now called Port Eaton). Vessels of largest size anchor in Huntington Bay for shelter, the bay being protected against all but northerly winds. In bad weather it is frequently used by the large sound steamers, both in summer and winter."

—. That is not correct; that is wrong, in my estimation. The chart shows you that the course the Norwalk light-house bears from the light-house on Eaton's Neck, I should think, is somewheres about north.

Q. That is right. Now, do you know how far it is across there?

A. From light-house to light-house?

193 Q. Yes.

A. I should think about probably seven and a half to eight miles.

Q. If that is the case, can there be any greater rake than seven and a half or eight miles with a northerly wind?

A. With a northerly wind, no. There can be with the wind to the eastward a little.

Redirect by counsel for defendant.

By Mr. KEOGH:

Q. In what respect were you about to say that book was incorrect?

A. In regard to courses.

Q. State how.

A. I have consulted that running in places that I have been unfamiliar with. I have been master of several steam-yachts cruising to the eastward, and I have run on courses given to me by that Coast Pilot, and I have found out they were considerably out of the way.

Q. In what respect was what he read from it in respect to Huntington Bay incorrect?

A. About the shelter with a northerly and northeasterly wind—certainly that is correct. I know because a northeast wind or northwest wind blows right in the bay.

Q. Would it be safer to be in the open sound?

A. I prefer the north shore.

Q. You live in this State, I believe?

A. I live in Brooklyn.

Recross by counsel for plaintiff.

By Mr. ACKERLY:

194 Q. You use in your business a row-boat going up and down the sound?

A. When I was Hell Gate piloting——

Q. I thought you were now.

A. For seven or eight years I have been master of steam-yachts, and working in other places.

Q. Is what you use when you go down the sound a row-boat?

A. I have used a sailing vessel.

Q. What have you used during the last twenty years?

A. I have used, a part of the time, a small boat.

OSCAR DARLING recalled on behalf of defendant.

By Mr. KEOGH:

Q. I hand you the map which has been used by the counsel for the plaintiffs and ask you to look at Huntington Bay and the harbors off Huntington Bay and the surroundings there. This map has been used during the trial and shown to the jury. I ask you to look and state if that map is in all respects correct in its representations of harbors and bays.

A. I should prefer to compare it with something more authentic.

Q. I mean, from what you know, does it correctly and accurately represent Huntington Bay and its harbors or not?

A. *Of* you mean by accurately exactly, I should say no; substantially, yes. I think the relative position of the beaches is not correct. I don't think there is such a divergence from the narrowest point of the harbor to the extreme point of the beach as is shown on here. That is the entrance to the harbor. Huntington Bay I
195 am speaking of. I think the distance shown between East Neck and West Beach is possibly exaggerated somewhat. The scale is so small that I don't know as I could particularize to any great extent. It doesn't accurately delineate the shores of Huntington Bay. There are many little inaccuracies appear to me. That opening into Lloyd's Harbor looks exaggerated, and into Northport Harbor looks exaggerated, and into Northport Harbor both appears exaggerated. I should think that the opening at the point of the beach, between the point of the beach and the upland, into Lloyd's Harbor was shown greater here than it is. The entrance—I have already said I thought that was exaggerated. Generally and substantially the map shows the relative position. It is exaggerated in some points and in others nearly correct. The general trend of the shore as shown here is about correct—substantially correct.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

This map introduced of the oyster lands, I made that from survey, and that is actually correct.

Q. Now, what you said with reference to this being a little wider, and that being a little further off here——

A. I spoke more particularly as to the extreme ends of the beach. Across there—I think this is narrower than shown here.

Q. But substantially it is correct?

A. Substantially correct.

NICHOLAS W. ABBOTT, a witness called on behalf of defendant, being duly sworn, testifies:

By Mr. KEOGH:

196 I am a pilot. I have been a pilot thirty years and over. I have piloted vessels through Long Island Sound. I know the bays and harbors of Long Island Sound. I know Huntington Bay. Huntington Bay lies between Lloyd's Neck and Eaton's Neck.

Parts of it run in—a cove; it is called a bay; it lies—Northport Harbor puts out from it and Lloyd's Harbor and Centerport Harbor puts out from it; there are four harbors puts out from it. The bay opens to the sound. The bay lies right on the sound. The uses of the bay for mariners—well, occasionally they will drop their anchors in there for a shelter, but never if they can go on; never will stop there if they can pass on—have any wind to go on. The points of wind they would seek a shelter from is from east-northeast around to a southern board, southeast and east around the southwest. The other points on Long Island shore that furnish a shelter are Crane Neck, Oldfield, Hempstead Bay. Along there the shelter is about the same. Nearly all the projections of the land along the shore furnish the same shelter; with the wind from other points it is a very poor harbor. I don't call it a harbor; you can't make it a harbor. I never would anchor there to make it a harbor; merely to stop awhile—to drop anchor for a little while, but to go for a harbor I wouldn't anchor there if I had to go away. When the wind is light they will sag in there; with a head tide the anchorage is good. If the wind is the right way they will drop in there. I have been over to New Haven, and rather than to go to Huntington I have run away back to Hart Island Harbor. In case the wind came to
northward or northwest, then I could make my run clear
197 through, when if I got into Huntington Bay I would have to lay there if it blowed heavy, and if I attempted to go my anchor would miss stay or something; one darsn't to risk it. I never anchored there without it has been a pilot-boat, and then I have had to lay there. Once I had to lay there three days; couldn't get our anchor up; feared we might be dragged ashore or go ashore. It blowed pretty heavy to the northward.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

I live down at City Island. I like to get home when I can get there like everybody else; sometimes we can't for a month or more. With a northeast wind, a fair wind, I can go down home. I know about Huntington Bay. I have been there a number of times. I always avoid it when I have a heavy vessel. There is no place for a square-rigged vessel in there. I have been up that way much during a northeaster. I have seen vessels in there sometimes, quite a number. I know about Lloyd's Harbor. That is a good harbor for small vessels, not for sea-going vessels. I have been in Northport Harbor. It is a pretty good harbor for small vessels. Well, you can go into Lloyd's Harbor, I guess, with eight or nine feet at the mouth of it; it don't do to go up very far. I know about Cold Spring Harbor. I have been in there. That is not a good harbor unless you are going to lay there; not to go in to make a stop; can't get out of there. I don't call Smithtown Bay, Crane Neck, a good harbor. They are as good as Huntington Bay. I can't see any
difference; can't see no difference at all. Hempstead Harbor
198 is about the same. It may be a trifle better than Eaton's Neck, because there isn't the rake of water across there; it is

narrower across the sound there. Vessels use it to anchor there occasionally, not very often there, not a bit more than they do above. Manhassett Bay is about the same; a north wind or northwest wind will catch you there. Vessels use that quite extensively.

Q. All these harbors put in from Long Island Sound?

A. Harbors run up in there; Hempstead Harbor and Cold Spring Harbor all put out directly into the sound, but Cold Spring Harbor is away up above; the same as the bays, harbors put out from the bays. Smithtown Bay opens into Long Island Sound the same as Huntington Bay—that is, a little worse than Huntington Bay; it isn't quite so deep.

THERON W. LOCKWOOD, a witness called on behalf of defendant, being duly sworn, testifies:

By Mr. KEOGH:

I live at Five Mile River, Connecticut. My business is oystering. I am a pilot; I am a steamboat pilot. I pilot steamers through the sound as far as my license goes. My license runs from New Haven to Sandy Hook. I pilot through that portion of the sound which I would pass through in passing Huntington Bay. I know Huntington Bay; I have known it twenty years. It is used for a place to stop in because of fog or light winds—vessels frequently go in there, drop their anchors—or to keep out of steamboats' way; but to use it for a harbor, I never done it and never thought no one else used it as a harbor, as a stopping place to get out of
199 the track of sound steamers and to wait for wind. It has been largely used for anchoring in. I have seen quite a number of vessels in there; yes, sir. In case of a storm, take it—the wind to the southward, on a southward board—and it makes a good lee; but I should say from east-northeast to west-northwest there is no lee at all—no chance to make a harbor there.

Cross-examined by counsel for plaintiff.

By Mr. ACKERLY:

Q. Don't the wind blow directly off shore—the east side of Huntington Bay—with the wind east?

A. Well, I don't know but it does—very nearly; I don't know exactly.

Q. And you don't call a place a harbor where the wind blows directly off the shore, do you?

A. I have seen it very rough with the wind that way, sir.

THEODORE LOWNDES recalled.

By Mr. KEOGH:

I made application to the fish commissioners of this State for a license under the laws of 1887 creating the fish commissioners. The town of Huntington appeared on my application and objected to my obtaining it on the ground that they were the owners, and

the fish commissioners decided that until the differences between me and the town of Huntington were settled they would take no action. I then withdrew my application.

Defendant rests.
Testimony closed.

200 *Motion.*

Mr. PLATT: I move for the direction of a verdict for the plaintiff, if your honor please, on the ground that the evidence shows title in the plaintiffs by the patents in evidence; also shows title in the plaintiffs by the grant from the State of New York; that the evidence shows no title by adverse possession in the defendant and no legal right to the possession to these lands by the defendant at the time of the commencement of this action or at the time of the grant from the State of New York or at any time as against the plaintiffs;

On the ground that defendant *ahs* not proved facts sufficient to make out any lawful claim to the possession of the lands in controversy, and the plaintiffs have shown facts sufficient to entitle them to recover.

It is admitted that the ground in question is the ground adjoining that involved in Lowndes against Dickerson, and that the Lowndes referred to in that suit is a brother of Theodore Lowndes, the defendant.

After argument upon the motion by counsel on both sides the court adjourned, and decision upon the motion was reserved until to-morrow morning, Tuesday, Nov. 19, at 11 a. m.

Mr. PLATT: With the permission of the court, I offer in evidence an extract from Livingston and Smith's Law, page 265. It is as follows:

Chap. LXIV.

201 "An act for the preservation of oysters," &c., "passed the 16th of December, 1737."

"I. Be it therefore enacted by his Honor The Lieutenant Governor, the Council and the General Assembly, and it is hereby enacted by the authority of the same, that no person or persons whatsoever, not residing within this Colony, from and after the publication of this act, do presume, directly or indirectly, to rake or gather up any oysters within this colony, and put them on board of any canoe perriuger, flatt, scow, boat or other vessel, whatsoever, not wholly belonging to and owned by persons who live within the aforesaid colony, under the penalty of seizing and forfeiting of all such canoes perriungers, flatts, scows, boats or other vessels, that shall be found doing the same, together with all the oysters, shells, oyster rakes, tongs and all other furniture and apparel thereto belonging."

The record is admitted in evidence.

Mr. KEOGH: I will ask your honor to direct a verdict for the defendant.

Motion denied. Defendant excepts.

Mr. KEOGH: I ask to go to the jury on the question whether Huntington Bay is or is not a portion of Long Island Sound under the testimony.

Motion denied. Defendant excepts.

Mr. KEOGH: I will ask your honor to permit me to go to the jury on the question of facts whether Huntington Bay is or is not within the limits of the town of Huntington, under the testimony.

Motion denied. Defendant excepts.

Mr. KEOGH: I will ask your honor to permit me to go to the jury on the question whether the defendant has proven continu-
202 ous use and occupation of the lands in question from 1867 to the present time.

Motion denied. Defendant excepts.

Mr. KEOGH: I ask your honor to direct a verdict for the defendant on the ground that it does not appear from the patents offered in evidence that the lands under the waters of Huntington Bay are within the bounds of the town of Huntington.

Motion denied. Defendant excepts.

Mr. KEOGH: I ask your honor to direct a verdict for the defendant on the ground that the rights which the defendant had acquired as a citizen of this State were not lost by reason of his change of residence to the State of Connecticut, but that these rights were continuous so long as the plaintiff permitted him to enjoy peaceable occupation of the land in question.

Motion denied. Defendant excepts.

Mr. KEOGH: I ask your honor to direct a verdict for the defendant on the ground that the plaintiff having acquiesced in and consented to the occupation, use, and improvement of the lands in question for a long period of time—upwards of twenty years—that they were estopped from now ejecting this defendant from these premises.

Motion denied. Defendant excepts.

Mr. KEOGH: I ask your honor to permit me to go to the jury on the question as to whether Huntington Bay is or is not a harbor or haven.

Motion denied. Defendant excepts.

The COURT: I direct a verdict for the plaintiff.

203 Defendant excepts.
The jury found a verdict accordingly.

Sixty days granted defendant to make a case.

The foregoing case contains all the evidence and proceedings on the trial of this action.

E. HENRY LACOMBE.

To the rulings of the court upon the requests of the plaintiff's counsel and directing a verdict for the plaintiff the counsel for the defendant as to each of them duly excepted. The jury, under the direction of the court, thereupon rendered a verdict in favor of the plaintiff; to which direction the defendant excepted.

And inasmuch as the matters aforesaid do not appear upon the record or otherwise than by this bill of exceptions, on the prayer of the said defendant, by his counsel, the said judge has settled and allowed as of the term when the said cause was tried, to wit, the November term, A. D. 1889, and thereupon the said judge has signed the same with his hand as of the 19th of November, A. D. 1889.

Case and bill of exceptions settled and allowed.

E. HENRY LACOMBE.

204 U. S. Circuit Court.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff,
*vs.*
THEODORE LOWNDES, Defendant.

*Stipulations.*

It is hereby stipulated and agreed that the following maps used on the trial may be used on any and all appeals taken in this case without printing in the case or bill of exceptions, to wit: (1) map of Huntington Bay, by Oscar Darling, C. E.; (2) Beers, Comstock & Kline's atlas of Long Island and Huntington; (3) United States Coast Survey.

It is further stipulated that all laws marked as exhibits in the bill of exceptions may be used and referred to in like manner.

N. S. ACKERLY,
*Attorney for Plaintiff.*
MARTIN J. KEOGH,
*Defendant's Attorney.*

Dated N. Y., February 12, 1890.

Endorsed: Bill of exceptions. Filed February 19th, 1890.

205 U. S. Circuit Court, Eastern District of New York.

THE BOARD OF THE TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff,
*vs.*
THEODORE S. LOWNDES, Defendant.

This cause, having been brought originally in the supreme court of the State of New York and thereafter duly removed into the circuit court of the United States for the eastern district of New York

by the defendant, Theodore S. Lowndes, and the said cause having been thereafter brought on for trial in said circuit court before the Honorable E. Henry Lacombe, circuit judge, and a jury, and the court, on the 19th day of November, 1889, having directed a verdict in favor of the plaintiff and against said defendant, now, on motion of N. S. Ackerly, attorney for the plaintiff, it is ordered, adjudged, and decreed that the above-named plaintiff, The Board of Trustees of the Town of Huntington, do recover of the defendant, Charles S. Lowndes, the immediate and exclusive control of the premises described in the complaint as follows, viz: All that certain tract of land under water in Huntington Bay, in the town of Huntington, county of Suffolk, State of New York, described as follows: Beginning at a point near the south shore of Huntington Bay near the piles of the old east dock, opposite the residence of Titus Conklin, at about three feet of water at low water, and running north till
203 it comes to mud bottom; thence running westerly on the range of a tree on Hog Island seen through Lloyd's Harbor; thence southerly on the range of a monument set on the shore of Huntington Bay to about three feet of water at low tide; thence easterly along the line of about three feet of water at low tide to the point or place of beginning, being nearly the whole of lots Nos. 61 to 72, inclusive, and 86 and 91, inclusive, on a map of said Huntington Bay made by Oscar Darling, civil engineer, dated August 25, 1887, and filed in the town clerk's office of the town of Huntington August 29, 1887, said tract containing about three hundred acres, be the same more or less; and further ordered and adjudged that the plaintiff, The Board of Trustees of the Town of Huntington, do recover of the defendant, Theodore S. Lowndes, the sum of two hundred and thirty-one and $\frac{20}{100}$ dollars, the costs as taxed, and that he have execution therefor.

Dated Brooklyn, N. Y., February 17, 1890.

By the court:

B. LINCOLN BENEDICT, *Clerk.*

207 U. S. Circuit Court, Eastern District of New York.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON
*vs.*
THEODORE LOWNDES.

*Bond for Damages and Costs.*

Know all men by these presents that we, John H. Lowndes and Charles Lowndes, are held and firmly bound unto the above-named The Board of Trustees of the Town of Huntington in the sum of five hundred dollars, to be paid to the said The Board of Trustees of the Town of Huntington; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-eight day of January, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named Theodore Lowndes has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Theodore Lowndes shall prosecute his said
208 writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN H. LOWNDES. [L. S.]
CHARLES LOWNDES. [L. S.]

Sealed and delivered and taken and acknowledged this 28th day of January, 1890, before me—

DAVID S. WENDELL,
*Not. Pub., N. Y. Co.*

UNITED STATES OF AMERICA,
*Eastern District of New York,* } *ss:*

John H. Lowndes, being duly sworn, doth depose and say that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

JOHN H. LOWNDES.

Sworn to this twenty-eighth day of January, A. D. 1890, before me—

DAVID S. WENDELL,
*Not. Pub., N. Y. Co.*

Approved.

E. HENRY LACOMBE, *Judge.*

UNITED STATES OF AMERICA,
*Eastern District of New York,* } *ss:*

Charles Lowndes, being duly sworn, doth depose and say that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

CHARLES LOWNDES.

Sworn to this twenty-eighth day of January, A. D. 1890, before me—

DAVID S. WENDELL,
*Not. Pub., N. Y. Co.*

Approved 1890.

E. HENRY LACOMBE, *Judge.*

Endorsed.

209 U. S. Circuit Court, Eastern District of New York.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Plaintiff,
*vs.*
THEODORE S. LOWNDES, Defendant.

It is hereby consented that the foregoing shall constitute the record on appeal of the above-entitled cause to the United States Supreme Court, without prejudice to either party to hereafter move to correct the same if any errors shall be found therein.

Dated Brooklyn, N. Y., May 12th, 1890.

MARTIN J. KEOGH,
*Def't's Att'y.*

N. S. ACKERLY,
*Pl'ff's Att'y.*

210 UNITED STATES OF AMERICA, *Eastern District of New York*, } *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America, eastern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from one to two hundred and thirteen, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Board of Trustees of the Town of Huntington, plaintiff, against Theodore Lowndes, defendant, as the same remain of record and on file in said office.

The Seal of the Circuit Court, Eastern District of New York.

In testimony whereof I have caused the seal of the said circuit court to be hereunto affixed at the city of Brooklyn, in the eastern district of New York, in the second circuit, this twentieth day of May, in the year of our Lord one thousand, eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

B. LINCOLN BENEDICT, *Clerk.*

211 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The Board of Trustees of the Town of Huntington, plaintiff, and Theodore Lowndes, defendant, a manifest error hath happened, to the great damage of the said Theodore Lowndes, as is said and appears by — complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twelfth day of February, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and —.

The Seal of the Circuit Court, Eastern District of New York.

B. LINCOLN BENEDICT,
*Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

[Endorsed:] Supreme Court of the United States. Theodore Lowndes, plaintiff in error, *vs.* The Board of Trustees of the Town of Huntington, defendant in error. (Original.) Writ of error. Martin J. Keogh, James C. Carter, attorney- for plaintiff in error, Temple Court, N. Y. city. Due service of a copy of the within writ of error is hereby admitted this — day of January, 1890. —— ——, attorney for defendant in error.

212 UNITED STATES OF AMERICA, *ss:*

To The Board of Trustees of the Town of Huntington, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein Theodore Lowndes is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated February 12th, 1890.

E. HENRY LACOMBE.

[Endorsed:] U. S. Supreme Court. Theodore Lowndes, plaintiff in error, against The Board of Trustees of the Town of Huntington, defendant in error. (Original.) Citation. Martin J. Keogh, James C. Carter, attorney- for plaintiff in error, Temple Court, N.

Y. city. Due service of a copy of the within citation is hereby admitted this 12 day of February, 1890. N. S. Ackerly, attorney for defendant in error.

213 Supreme Court of the United States.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON, Defendant in Error,
*ads.*
THEODORE S. LOWNDES, Plaintiff in Error.
} Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by N. S. Ackerly, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

N. S. ACKERLY,
*Attorney for Defendant in Error, Northport, Suf. Co., N. Y.*

[Endorsed:] United States Supreme Court. Theodore S. Lowndes, plaintiff in error, *vs.* The Board of Trustees of the Town of Huntington, defendant in error. Joinder in error. N. S. Ackerly, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this — day of ——, 188–. —— ——, attorney for plaintiff in error. To —— ——, attorney for plaintiff in error.

[Endorsed:] U. S. Supreme Court. The Board of Trustees of the Town of Huntington, deft't in error, *ads.* Theodore S. Lowndes, pl't'ff in error. Record.

Endorsed on cover: E. New York C. C. U. S. No. 1188. Theodore Lowndes, plaintiff in error, *vs.* The Board of Trustees of the Town of Huntington. Filed June 12, 1890.

Office Supreme Court U. S.
FILED.
DEC 9 1893
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

THEODORE LOWNDES,

*Plaintiff in Error,*

*vs.*

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON,

*Defendants in Error.*

**No. 117.**

# BRIEF FOR PLAINTIFF IN ERROR.

JAMES C. CARTER,

*Of Counsel for Plaintiff in Error.*

NEW YORK
PRESS OF ALBERT B. KING, 89 WILLIAM ST.
1893

# Supreme Court of the United States.

THEODORE LOWNDES,
Plaintiff in Error,

*vs.*

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON.

## STATEMENT OF THE CASE.

This was an action in the nature of ejectment brought by the Trustees of the town of Huntington against the plaintiff in error, to recover possession of certain lands under water in Huntington Bay, on the north side of Long Island, to which the plaintiffs below claimed title.

The action was originally brought in the Supreme Court of the State of New York, and was removed to the United States Circuit Court on the application of the defendant below by reason of his being a resident of the State of Connecticut. At the conclusion of the evidence both parties asked the Court to direct verdicts in their favor respectively, and in addition to this the defendant, in case his request was denied, made several requests to be allowed to go to the jury upon questions stated by him.

The Court denied all the requests of the defend-

ant and granted the motion of the plaintiffs, and directed a verdict for them. From the judgment entered upon this verdict a writ of error was taken out to this Court.

Upon the trial of the action, the plaintiffs below, in order to support their claim of title, put in evidence three several colonial charters purporting to convey to them large tracts of land on Long Island, and also certain lands under water within the boundaries described in the charters. It was necessary, therefore, that it should appear that Huntington Bay, to which the plaintiffs laid claim, and in which the lands under water in controversy were, should appear to be within the boundaries laid down in the charters. These bounds were not precisely the same in each of the charters, but were expressed to be corrected in the charter of Gov. Fletcher, the last of the three, dated in 1694 (Record, p. 24), and were in that instrument as follows:

> "All the aforecited Tracts and Necks of
> "Land lying upon our sayd Island of Nassaw,
> "within our sayd County of Suffolk, Bounded
> "on the West by a River called & known by
> "the Name of Cold Spring, a Lyne running
> "South from the Head of the sayd Cold Spring
> "to the South Sea, & on the North by the
> "Sound that Runns between our sayd Isld of
> "Nassaw and the maine Continent, & on the
> "East by a Lyne runing from the West syde
> "of a Pond called & known by the Name of
> "fresh Pond to the West syde of Whitmans
> "Dale or Hollow, and from thence to a River
> "on the South syde of our sayd Island of
> "Nassaw on the East syde of a Neck called

"Sumpawwawins, and from the sayd River
"Runing South to the sayd South Sea,
"Together with all and Singular the Houses,
"Messuages, Tenements, Buildings, Mills, Mill
"damms, fenceing, Inclosures, Gardens, Or-
"chards, fields, Pastures, Feedings, Woods,
"Underwoods, Trees. Timber, Common of
"Pasture, Meadows, Marshes, Swamps, Plaines,
"Rivers, Rivoletts, Waters, Lakes, Ponds,
"Brooks, Streams, Beaches, Quarries, Creek,
"Harbors, Highways & Easements, fishing,
"fowleing, hunting and hawking, Mines, Min-
"eralls (Silver and Gold Mines Excepted), & all
"other franchises, Profits, benefits, Comoditys
"& Hereditaments whatsoever to the sayd Tract
"of land within the limits and Bounds next
"above mentioned belonging or in any ways
"appertaining."

It will be seen by this description that the north boundary of the grant was "the Sound that Runns between our sayd Isld Nassaw and the maine Continent"; in other words, Long Island Sound. A glance at the map will show that Huntington Bay is a deep and wide projection of Long Island Sound into the northerly shore of Long Island. The claim of the plaintiffs below was, and is, that Huntington Bay passed under this charter because it was a *harbor*, although the map shows that the line drawn between the headlands, that is, from Lloyd's Point to Eaton's Point, is some seven or eight miles long and embraces a very large part of what any one would say was Long Island Sound, and the main question of construction, so far as these charters go, is whether an open piece of water like that, not constituting a harbor in the proper

sense of the word, and embracing such a prodigious extent of open and navigable waters, could have been understood to be included within the premises granted by these charters.

A brief reference to the history and condition of the title to lands under water adjacent to the shore along many parts of Long Island will enable this question to be better understood.

A large part of Long Island was originally settled by colonists proceeding mainly from the English Colonies in Massachusetts Bay and Connecticut. They acquired, in the first instance, no titles except such as were derived by purchase from the Indians, and these have never been acknowledged in this country as constituting title against the State, although they have been regarded as affording strong moral grounds upon which the State or sovereign would confer a title. This territory being included in the English royal patent of the Duke of York, he required the settlers to abandon their possessions or accept a title under him and on the terms, and conditions imposed by him, which were not onerous, and, accordingly, patents were issued by him to the principal undertakers of the several settlements. These patents were all very similar in language, and not only conveyed large tracts of land, but also erected the grantees into corporate bodies called towns. This is the origin of several of the towns of largest territorial extent on Long Island.

For divers reasons, to which it is not important here to allude, the colonists were required in most, if not all, instances, to surrender their original charters and take new ones, and in this way most of the towns received two or three distinct charters;

and, as the acceptance of a new charter involved the surrender of the old, the last charter is in general the instrument to which we must look in determining the rights acquired under these royal grants.

All of them included grants, not only of land, but, as incidental thereto, of lands under water adjacent to the shores. How extensive it was intended these grants of lands under water should be, has been a matter of much dispute until a comparatively recent period, and is not yet indeed fully settled. The grants usually run north and south across the island, the boundary on the north being Long Island Sound, and on the south the ocean. Inasmuch as on the south side the land washed by the ocean is a narrow strip of sandy beach extending along nearly the whole of Long Island, and a very long and rather narrow tract of shoal water is included between this beach and the main land of the island, there seemed to be good ground for the claim that it was the intention of the charters to convey to the towns, under the grants, the lands under water in these south bays. They were in every sense of the word *interior* waters, and entirely within the boundaries of the grants. Accordingly, from a very early period, the towns asserted a title to the lands under water in the bays on the south and the right to control shell and other fisheries therein. This claim was not altogether undisputed, but, in the year 1873, the town of Brookhaven asserted by action its title to that part of Great South Bay which was between its east and west boundaries, and the claim was sustained in the Court of Appeals ; the Court, however, did not rest its decision wholly upon the language of the charter, relied very much upon the

circumstances of long continued assertion of title and acts of ownership on the part of the town of Brookhaven. (Brookhaven *vs.* Strong, 60 N. Y., 56.)

There had been similar assertions of title in some cases, under these charters, to lands under waters in the *land-locked harbors* on the north side of the island, and in the year 1880, or thereabouts, on the strength of the decision before referred to, the town of Huntington, the plaintiffs below, brought a suit to assert title to the lands under water in Northport Bay, on the north side of the island, and the Court of Appeals decided in favor of the claim (Robbins *vs.* Ackerly, 91 N. Y., 98); but here again it will be seen, on a glance at the map, that Northport Bay is a perfect and complete harbor, entirely land-locked, and wholly within the admitted boundaries laid down in the charter, which is the charter in the present suit. There is land upon all sides to the north of it. And in this case also the decision was put, not upon the language of the charter alone, but upon that language taken in connection with a mass of evidence showing a claim of title by the town long continued and beginning nearly contemporaneously the charter.

The distinguishing feature of the present case is that there is no land lying to the north of Huntington Bay; that the bay itself is not properly speaking, a harbor, although it affords a certain lee or shelter to vessels under certain conditions, and that it embraces a prodigious extent of public navigable water of great depth; and besides this, there is an entire want of any evidence tending to show any assertion of title to Huntington Bay until about the year 1880.

The plaintiffs below, however, conscious that they could not support their claim of title wholly upon the charters and proof of acts of possession which had proved sufficient to support the claim to Northport Bay, procured in 1883, before bringing the present action from the legislature of New York, an act of cession, of which the following is a copy :

CHAP. 279.

AN ACT to cede lands under water of Huntington bay, town of Huntington, Suffolk County, Long Island, to the trustees of the town of Huntington, and their successors in office, for the cultivation of shellfish.

" SECTION 1. All the right, title and interest " which the people of the State of New York " have, if any, in and for the lands outside of " and beyond low water mark under the waters " of Huntington Bay, in the town of Hunting- " ton, Suffolk County, southerly of a line " drawn from a granite monument now set near " high water mark on the northerly point of " Eaton's Neck, and west of the United States " Life Saving Station to a locust monument " now set on Lloyd's Neck, which line runs on " a course south, fifty-nine degrees, twenty " minutes and twenty-five seconds west, and " which is the line claimed by the trustees of " the town of Huntington as the northerly line " of their grants under Colonial patents, is " hereby ceded to the present trustees of the " town of Huntington, Suffolk County, and " their successors in office for the purpose of " oyster cultivation. Provided nothing in this

"act shall be held to interfere with the rights
"and powers of the Commissioners of the Land
"Office to grant, all the right, title and interest
"of the State to lands under water in said bay,
"to the owners of adjacent uplands for pur-
"poses of commerce or beneficial enjoyment,
"and nothing herein contained shall be con-
"strued as interfering with the rights of
"riparian owners; subject, however, and with-
"out prejudice to the legal rights, if any, of
"such persons as now have oysters planted on
"the lands aforesaid."

This act of cession was relied upon as conveying title to the plaintiffs below in case it should be determined that the charters were insufficient for that purpose.

It will be observed that there are important qualifications and limitations to this grant, and the question whether it furnishes any support to the claim in this action will be better understood by a brief reference to the business of *planting and cultivating oysters*, as it has been, for many years, carried on in the waters of New York, and in relation to some perplexities which have arisen in respect to the title of lands under water along the shore of Long Island.

It is matter of familiar knowledge that the practice of gathering oysters, and planting them in beds, for the purpose of growing and fattening them, was begun a great many years ago, and has regularly increased until within recent years it has assumed prodigious proportions.

The waters in which the oysters have usually been planted for the purposes above mentioned have generally been, or regarded as being, the

*public* waters of the State, in which there has been an unrestricted liberty to all persons not only of *taking* oysters and other shell fish, but of using the bottom for the purpose of *planting* them in order that they might grow and become fit for the market. Ordinary notions of right and wrong, and the general assent of those engaged in the business in such public waters, have established that oysters wherever taken, when planted in a bed regularly staked out for the purpose, are the property of the person planting them ; and also that no other person can acquire any right of taking up the oysters so planted by planting others thereon which he may have gathered himself. One man cannot indeed, by planting oysters in a spot where there is already a natural growth, deprive others of the right of taking the natural oysters ; and, if others should incidentally take some of those planted, no injustice would be done to the party originally planting them. As a consequence of this practice, and of the plain and simple notions of right and wrong upon which it is founded, the right of a person planting oysters for the purpose of cultivation in places fit for that purpose, not only to the oysters, but to the continuous use of the bed for the same purpose, has been long recognized by the Courts, and once in a suit relating to the business carried on by the plaintiff in error (Lowndes *vs.* Dickerson, 34 Barb., 586).

It will be perceived, therefore, that the oyster business as thus conducted, and consisting of the planting of oysters elsewhere gathered for the purposes of cultivation, proceeds upon the policy that the right to the use of the bottom for such purposes is in the absence of any assertion by the State of its rights as owner, free to all, and

that no restrictions are needed, or proper, except such as are necessary to assure to each one engaged in the business the right to the fruits of his own labor and to exemption from encroachments by others.

Different considerations, however, arise where either the State undertakes to assert its own right, or has conveyed its own lands under water to others, as it may do. In such a case, the State or other owner may, if they choose, treat the title to the waters as any other piece of property, and exclude all others from enjoyment of it. This is exercising the ordinary rights of the owner of property.

The indefiniteness and uncertainty connected with the subject of title to public, navigable waters, and the fisheries therein, has affected the legislation of New York upon the subject, which has proceeded upon different motives and different assumptions, some of them, at least, quite erroneous.

There have been numerous statutes enacted during a long period of years for the purpose of protecting the *oyster fishery* against an *improvident and destructive pursuit* of it, and these statutes have, some of them at least, been made directly applicable to waters which, together with the right of fishery, had been conveyed, as already mentioned, to some of the towns on Long Island. Such legislation may perhaps be defended upon the ground that it is the public interest to secure an adequate and permanent supply of oysters. But it is a little difficult to see upon what ground the State can prevent a man from taking, when he pleases and as he pleases, oysters that he has planted upon his own soil, for the mere purpose of

fattening, any more than it could regulate his right of taking the products of his farm. But this has no near connection with the mere use of the bottom of public waters for the purpose of growing and fattening oysters.

Again, there has been a feeling of jealousy on the part of residents of the State of New York against the taking of oysters from their natural beds in the public waters of that State *by non-residents*, and statutes have been passed prohibiting such taking by the latter; and such public waters have been made to expressly embrace those which have been conveyed away by the State to towns, as before mentioned, and perhaps leased by the towns to private individuals. The State undoubtedly has the right to exclude anybody it pleases from the enjoyment of the fisheries to which it is itself entitled. This is but exercising the right of an owner of property; but it is difficult to see upon what ground the State can prohibit a non-resident from taking oysters from grounds belonging, together with the fisheries thereon, to towns or to private individuals, when he may have acquired the right to do so by contract with such towns or private individuals.

Sometimes the towns owning, or claiming to own, public waters and the oyster fisheries therein, have been willing that their own inhabitants should enjoy them indiscriminately, but desire to prohibit any such enjoyment to persons *not inhabitants of the towns*, and legislation to that end has been obtained. We have many laws which make it a misdemeanor for the inhabitants of other towns to take oysters from the waters of towns so having, or claiming, exclusive title. Such statutes seem to be of very doubtful validity. Surely such towns

as really have exclusive title to the oyster fisheries may sell or lease such fisheries to whomsoever they please; but the existence of such statutes, if they were of any validity, would deprive such transactions of any effect.

These observations, so far as they relate to the legislation of New York upon the subject of *gathering* oysters from their *natural beds*, are pertinent only because it is, in some instances, embraced in legislation which deals also with the use of the bottom not containing natural beds for the purpose of oyster cultivation.

The effect of the act of cession above copied depends not alone upon its own language, but also upon the attitude which the plaintiff in error occupied in relation to the premises in question. This was substantially as follows:

More than twenty years before the trial, the plaintiff in error, being then a resident of New York, had staked out the ground in question, and prepared it for the planting of oysters, without objection from the town of Huntington, and had continuously occupied it for that purpose ever since, and no objection to this continuous occupancy had ever been made by the town until a comparatively recent period. The beginning of the occupation was also long antecedent to any decision by the Courts, either that the patents to the Long Island towns did embrace public, navigable waters, or conveyed any exclusive right to the fisheries connected therewith; and had been vindicated by judicial decision (Lowndes *vs.* Dickerson, *supra*), although one of the points of that decision had been subsequently determined otherwise by the Court of Appeals (Trustees of Brookhaven *vs.* Strong, 60 N. Y., 56). The plaintiff in error ceased

to be a resident of New York by removing to Connecticut in 1872, but continued his business of cultivating oysters as before.

No *claim* of ownership to the place in question was made by the town of Huntington until a short time prior to the beginning of the suit.

The main questions in dispute are two: First. Did the town of Huntington acquire title to Huntington Bay under its colonial charter? Second. If it did not, did the act of cession confer upon it such a title as to enable it to maintain an action of ejectment against the defendant below?

## Specification of errors relied upon.

*First.*—That the Court below erred in denying the motion of the defendant below, made at the close of the evidence, that a verdict be directed in his favor (Record, p. 107).

*Second.*—That the Court below erred in denying the motion of the defendant below (made in the event of the denial of the above motion), that the defendant below be permitted to go to the jury upon the question whether Huntington Bay was or was not a part of Long Island Sound (Record, p. 107).

*Third.*—That the Court below erred in refusing the request of the defendant below (made in the same event as above stated) to go to the jury upon the question whether Huntington

Martin *vs.* Waddell, 16 Pet., 369.
Rice *vs.* Railroad Co., 1 Black, 369.
Fertilizing Co. *vs.* Hyde Park, 97 U. S., 659.
Lansing *vs.* Smith, 4 Wend., 9.
Chenango Bridge *vs.* Binghamton Bridge, 17 N. Y., 87.
(Reversed, on other grounds, 3 Wall., 51).

2. Were there, however, no such rule as the above, a just interpretation of the Colonial charters upon which the plaintiff below relied would not include in the grant any part of Huntington bay.

*a.* What is Huntington bay as *claimed* by the plaintiffs below? It is all that body of water lying south of a right line drawn from Eaton's Neck Point to Lloyd's Neck Point. Inasmuch as the claim of title to Huntington bay rests solely upon the assertion that it is a *harbor*, and, as it is not pretended that it is specifically bounded by any description in the charters, the bounds must be taken as nature has laid them down, and as commonly understood, if there were any common understanding. But no proof was given of any common understanding, and the only approach to a boundary laid down by nature is that above stated. It can hardly be said that this is a possible boundary even, but there

can be no other. There are no other points or headlands which would serve as the *terminus* of a line.

And such was the specific claim of the plaintiffs below, as proved by themselves on the trial (Record, pp. 49, 50).

Huntington bay, therefore, as the claim is, is an indentation in the land some seven or eight miles wide at the mouth, in all other places between one and two miles wide and between three and four miles deep, and open to the wind and sea through at least six points of the compass. The notion that such a piece of water passed under these charters, as being a harbor, is wholly inadmissible.

*b.* There are no *words* in the charters describing it. *Bays* are not mentioned.

3. The plaintiffs below sought to overcome this insuperable difficulty by introducing some feeble testimony to show that, although this enormous tract of water was *called* a bay, it was *in fact* a *harbor*. This effort was an utter failure. They succeeded only in proving that it afforded a *shelter* for vessels against storms in certain conditions of the wind and not in others. Huntington bay is not a *harbor* in any sense of the word, still less within the meaning of the charters.

*a.* It is not a harbor within any of the

ordinary definitions. A harbor is a place where "ships can ride *in safety*" (Webster *sub voce*). This does not mean in *immediate* and *present* safety. Any straight shore where vessels can anchor may furnish that sort of security. That is not a place of *safety* where a vessel is in danger upon a change in the fickle wind. A place, in order to be a *harbor*, must be a harbor at all times and under all conditions, otherwise it is not a place of *safety*. And there is no pretense that Huntington bay is a harbor when the wind is anywhere from N. N. E. to N. W. It is, indeed, a place often of extreme danger. If a vessel drawing such a depth of water, as not to permit her to enter Northport or the other harbors leading out of Huntington bay, were caught there by a violent north wind, she would be inevitably driven ashore. She would not be able to beat out.

*b.* It is not, and never was, *called or known* as a harbor.

*c.* It is in every sense of the word a *bay*. We hardly need to look into dictionaries to be told that "bay" is an indefinite word used to describe every sort of indentation in the land which is *open at the mouth*. According to Webster it is "an arm of the sea extending into the land, not of any definite form, but smaller than a gulf, and larger than a creek."

*d.* Undoubtedly as the mouths of bays be-

come narrower, they more and more approach the character of harbors, and would finally cease to be bays and become harbors. There might be instances near the boundary line, where it might be a question whether the word harbor or bay would more properly describe the place. The present, however, is no such instance. There is nowhere a narrowing of the mouth. That continually widens. The place has *all* the distingushing features of a *bay*, and *none* of those of a harbor.

4. The case of the plaintiffs below, is, in short, this: That although Huntington bay is not in *fact* a harbor, and was never *called or known* as a harbor, it is enough to make it a harbor within the meaning of these charters, if vessels can anchor there and be protected against *some winds*, although not against *others*. And this too although the *presumption* is that it was not the intent of the charters to embrace Huntington bay.

5. But this is not all. These charters are primarily and principally grants of *land*, and not of water, still less of public navigable water. So far as they are intended to be grants of *water*, it is only where the water is incident to the land, and *within* it. The words describing the waters designed to be conveyed are, "rivers, rivulets, waters,

lakes, ponds, brooks, streams, creeks, harbors." It is impossible not to see that the intent and meaning was to convey strictly *interior* waters.

It is for this reason that the Courts of New York have hesitated to allow that *harbors* of navigable waters passed by the grant, although that word was expressly employed. The rule of *ejusdem generis*, strongly tends to confine the meaning of the word harbors employed in the instruments to harbors of the *same kind* as the other waters described, namely, creeks, ponds, &c. Except for the abundant proof of claim of title and acts of ownership through a period of two hundred years, the word harbors would not probably have been allowed as sufficient to pass the title to such navigable waters as the cases of Brookhaven *vs.* Strong, and Robins *vs.* Ackerly (*supra*), related to.

It will be observed that all the proofs of ancient claim of title and acts of ownership contained in the record in this case are limited to Northport harbor, which is a harbor in the strictest sense of the term, though only for vessels of light draught.

*b.* During the period of two hundred years since the grant of the charters, no pretence of title was ever set up to Huntington Bay until about the year 1881, and long after the occupation of the plaintiff in error began. The first act of the town involving any assumption of title to Huntington Bay was a lease for getting gravel in 1881 (Record, p. 55).

7. If there were no other reason for rejecting the claim set up by the plaintiffs below, the single fact of *indefiniteness* would be sufficient. If Huntington Bay is not part of Long Island Sound, it must be possible to say where the former ends and the latter begins. But this is wholly impossible. Bay is a word of *indefinite* meaning, not designed for any purpose of accurate description, and therefore cannot be made a word of description of the premises conveyed by a grant.

Surely the presumption must be that it was the intent of the charters to furnish an *intelligent description* of the grant. To make the grant include "bays," which are not mentioned in it, is to substitute, in place of a clear and intelligent description, one which is wholly ineffective. What right have we to say that Huntington Bay extends to a line drawn between the headlands above mentioned?

8. An ancient and unbroken claim of title to Huntington Bay, accompanied by proof of *acts of ownership* during the whole period of the claim, would do much towards establishing the title in the town of Huntington, *provided* there was a *distinct northern boundary* to which the proofs would apply; but such a boundary would be necessary.

9. There is no pretence of such claim of title or

acts of ownership. The first *act* of *ownership* proved is found in an obscure description in a lease by the town of Huntington of a gravel point between the harbor of Northport and Huntington Bay, which *seems*, although this is not certain, to embrace land under water in Huntington Bay. It is enough to say that this lease was executed in 1881, two hundred years after the charter. All prior acts of ownership proved by the plaintiffs below relate to Northport Harbor, and in no manner to Huntington Bay.

As to distinct claim of *title*, the first instance appears to be found in the communication of the Trustees of Huntington to the Commissioner of Fisheries (Record, p. 49). This was in 1886. Leases for oystering were first made in 1882 (Record, p. 58).

*a.* When it is borne in mind that in respect to Northport Harbor there had been an effective assertion of title and acts of ownership for a period of one hundred years (one at least as early as 1795; Record, p. 45), the absence of similar assertions and acts in respect of Huntington Bay is of unmistakable significance.

*b.* It cannot be said that this was, or might have been, for the reason that there were no adverse claims, and consequently no necessity for affirmative and express assertion. The plaintiff in error had openly staked out his ground and occupied it con-

tinuously from 1867 (Record, p. 86). He was never disturbed by suit, or even notice to quit, until 1888 (Record, pp. 54, 83). And it was not until Nov., 1887, that the town came to the conclusion to try its fortunes by a suit at law (Record, p. 50). And this, too, while it had seven years before met an attempt to dispute its title to Northport Harbor by undertaking the defense of suits brought against its lessees (Record, pp. 52, 48, 49).

*c.* And even then it was not thought prudent to bring the action until the act of cession already mentioned had been obtained from the Legislature.

**Second Point.**—The act of cession of 1888 by the State of New York is wholly ineffective as a support to the present suit.

1. This is an action of ejectment, and can be maintained only when the plaintiff is entitled to the *possession* of the property. This act confers no general title. It does not authorize a *sale* of the property by the town, or a *use* of it for any other purpose save that of cultivating oysters. No right conferred upon the town by this deed could be interfered with by any occupa-

tion unless it conflicted with the right of the town to cultivate oysters. There is neither allegation or proof that the occupation of the plaintiff in errror at all obstructed the right thus conferred upon the town to cultivate oysters in Huntington Bay. There is no pretense that there was not abundance of other land in the bay equally adapted to the purpose, and sufficient to satisfy every call made upon the town for that purpose.

2. What the plaintiffs below must really maintain is that they gained by this act of cession the *exclusive* right to plant oysters in Huntington Bay. Such is not the *language* of the act, and surely it will not be aided by construction.

**Third Point.**—But it is hardly worth while to argue what the terms of the grant would have conferred upon the town had there been no qualification or exception, for there is an express proviso that the grant is to be "without prejudice to the legal rights, if any, of such persons as now have oysters planted on the lands aforesaid." This clause was expressly designed, and was entirely effectual to protect all such as were in the condition of the plaintiff in error.

1. It is believed that the design was to protect him alone, there being no other persons engaged in planting oysters there, except perhaps some who had engaged in the work under the recent pretended leases of the town, and who, of course, needed no protection against the town.

2. It may be argued that this clause is designed to protect those only who had legal rights *against the State.* This interpretation would be wholly unwarranted.

*a.* It does not *say* that, and an exclusive privilege in the town will not be created by implication.

*b.* But such an interpretation would be against settled and familiar rule. It would give the clause no effect. Any rights which any occupant might have had against the State *could* not have been affected by the conveyance of the State. They would have been fully saved and protected without any such clause.

*c.* Still further, and quite conclusively, *there was no such class of persons.* There was no way in which any right could have been acquired against the State by prescription or adverse *user*, and no prior grants or leases from the State are pre-

tended. Had there been any such prior grants or leases they would surely have been specially mentioned as such.

*d.* The class of persons whose rights are designed to be protected are described as being "such persons as now have oysters planted on the lands aforesaid." There were such persons, or at least one, the plaintiff in error, who had been carrying on the business on a very large scale for years without protestation by, and with the acquiescence of, the State, and who were still carrying it on at the time of the passage of the act (Record, p. 86). There can be no question that these were the persons intended to be protected by the State. The legislature had no intention whatever by any act of its own to destroy a privilege which it had cost the parties enjoying it much time, labor and expense to gain, and which it had permitted to be enjoyed for upwards of twenty years.

3. What then were the legal rights of the plaintiff? These are fixed with great precision by the necessities and the universal customs of the business and confirmed by the adjudications of the Courts. A man who wishes to *cultivate* oysters by planting them where they will grow to maturity and become fit for consumption, selects a place which is not a *natural bed* where oysters are *produced.*

He frees it from the starfish, the great enemy of oysters, and from marine growths and trash by cleaning the bottom, and then plants his oysters. No one else has the right to take those oysters. They are his property. Nor has another person a right to plant his own oysters there, for this would destroy the prior right. *It is an occupation in the highest degree useful to the public*, inasmuch as it is the only way by which a constant supply of the best quality of a most useful food can be furnished.

4. As against all persons, except the State of New York, therefore, the plaintiff in error had a perfect legal right to the exclusive occupation and enjoyment of his bed.

This has been fully determined by the Supreme Court of the State of New York, and by decisions which have never been questioned.

Fleet *vs.* Hegeman, 14 Wend., 42.
Decker *vs.* Fisher, 4 Barb., 592.
Lowndes *vs.* Dickerson, 34 Barb., 586.
People *vs.* Haven, 121 N. Y., 316.

5. These legal rights the plaintiff in error enjoyed *before* the act of cession against *all persons*, including the town of Huntington. They were what the *proviso* in the act of cession was intended to preserve *unaffected* by that act. Of course the *act* cannot be made the ground of affecting them.

The design of the act was not to *transfer* to the town of Huntington any right which the State might have had to oust the *present occupants*. The distinct object and purpose of the proviso was to *prevent* the act of cession from having that effect.

6. It is to no purpose for the town of Huntington to say that the plaintiff in error had no right to occupy the ground because he was not a resident of the State. That was no concern of the town of Huntington any more than it was of other parties. If the State did not choose to oust him, but had permitted him to remain there for years, it would be an indecency which the law would not for a moment tolerate for other parties to trespass upon him.

7. Nor is it necessary to go into the question whether, being a non-resident, his rights were less than those of residents of the State. He was a resident when he acquired his right, and remained so for many years; his loss of the right, if he did lose it, which is not admitted, by ceasing to be a resident, is a matter which concerns the State alone. Strangers would have no more right to take advantage of such a defect than one man would have a right to oust another from the possession of ordinary real property, on the ground, not that he had a title himself, but

that the occupant had none. The town of Huntington stood towards the plaintiff in error prior to the act of cession just as other persons stood towards him, and this condition it was the purpose of the subject clause to preserve.

**Fourth Point.**—It may be argued, in support of the judgment below, that while the view above set forth as to the purpose and meaning of the subject clause in the act of cession may be sound so far as respects any *residents* of the State who might have been occupying lands in Huntington Bay for the cultivation of oysters, yet that the law of New York (Penal Code, § 431, see Appendix) makes it a misdemeanor for non-residents either to plant or gather oysters in the waters of that State without the consent of the owner, and that consequently the plaintiff in error being at the time of the act of cession a non-resident, had *no* "legal rights" within the meaning of the subject clause. This position is wholly erroneous.

1. The object and purposes of this penal legislation should be clearly understood. Prior to its passage, and from colonial times, the principal oyster grounds of New York were in the waters within and around Long Island and Staten Island. The Great South Bay extending along nearly the whole Southern shore

of Long Island, and many of the harbors and interior waters on the north side of the same island, were peculiarly adapted both to the production and cultivation of shellfish. These grounds were owned, some of them by the ancient chartered towns, some of them by private persons under ancient royal and public grants, and some were the property of the State (Trustees, &c., *vs.* Smith, 118 N. Y., 634). Those belonging to the towns were sometimes leased, but were commonly left open for operation and use to the inhabitants of the towns, and under this general license non residents often engaged in the business of oystering. The waters belonging to the State were until a comparatively recent date left to be exploited by all persons indifferently; but in 1866 an act was passed, applicable only to the waters around and adjacent to Staten Island, designed to exclude non-residents from the benefits of such waters (Laws of 1866, Ch. 404, § 6). This section enacted as follows: "No person not being an inhabitant of this State shall be entitled to plant oysters in the waters of said county (Richmond County), except the consent of the owner first be obtained; and no person not being an inhabitant of this State shall be entitled to take oysters or clams from their beds of natural growth in any of said waters." A penalty followed. Acts prior to this time had been passed for the purpose of confining the privilege of taking natural oysters from *interior* waters to the inhabitants of the counties or towns within which such waters were

situated, but these were not aimed in particular against non-residents of the State. The use of the abundant public waters of the State, even by non-residents, there being more than enough for all, for the purpose of increasing the supply of wholesome food, was encouraged, at least, by non interference and tacit assent, until the jealousy of resident oystermen seeking to diminish competition succeeded in introducing a policy of restriction, which was partly begun in respect to waters far distant from the place in controversy by the act, above mentioned, of 1866.

An act was passed in 1878 and amended in 1879, which did aim to exclude non-residents of the State from certain oyster privileges; but it applied only to the *taking of oysters* from their *natural* beds, not to the *cultivation*. The act, as amended (Ch. 87 of the Laws of 1879), was as follows:

"SEC. 1. It shall not be lawful for any "person or persons, who shall not have been "actual residents and inhabitants of the "State of New York for the period of six "months, to rake or gather clams, oysters or "shellfish, either on their own account and "for their own benefit, or on account of or "for the benefit of their employers, in any "of the rivers, bays or waters of this State, "on board of any canoe, flat, scow, boat or "other vessel; but the provision of this section "shall not be so construed as proventing any "person, who shall have been an actual "resident and inhabitant of this State for a "period of six months, from employing any

"person or persons to rake or gather clams,
"oysters and shellfish, for the use and
"benefit of said person so having been for
"the period of six months an actual resident
"and inhabitant of this State."

2. Down to 1866 the business of *planting oysters for cultivation* was protected by the universal custom, by the adjudications of the Courts and by the provisions of positive laws, and no distinction was made between residents and non residents of the State. Chap. 753 of the Laws of 1866 contained the following:

"AN ACT to prevent the unlawful taking
"of oysters planted within the waters of the
"State of New York.

(Passed April 21, 1866.)

"SEC. 1. Any person who shall un-
"lawfully take and carry away by any
"means the oysters of another lawfully
"planted upon the bed of any of the rivers,
"bays, sounds, or other waters within the
"jurisdiction of this State, shall be deemed
"guilty of a misdemeanor, and upon con-
"viction shall be punished by a fine not ex-
"ceeding two hundred and fifty dollars, or
"by imprisonment in the common jail of the
"county where the offense was committed,
"for a period not exceeding six months, or
"by both such fine and imprisonment."

For the adjudications, see People *vs.* Haven; 121 N. Y., 316.

3. The ordinance of the Supervisors of the County of Suffolk, given in evidence for the plaintiffs below (Record, p. 43), made no change in this policy. That ordinance had no reference to the planting and cultivation of oysters; and if it had, it would be absolutely void. The Board of Supervisors had authority, under Chap. 194 of the Laws of 1849 and Chap. 482 of the Laws of 1875, to make *regulations* for the protection of shellfish against all injudicious taking, whether by residents or non-residents. They had no authority to deal with the waters of the State as a subject of property, and to determine who should and who should not enjoy rights of property therein. If they had authority to say that residents should, and non-residents should not, gather oysters, they had the like authority to say that non-residents should, and residents should not, gather them. Their function was to *protect* game, fish, etc., in order to save the subjects of their care from destruction, not to determine rights, or protect certain persons from acts by other persons.

This is entirely clear from the known general objects of such delegations of local administrative power, and from the language of the acts conferring the authority. (People *vs.* Haven, *supra*).

The provisions in the acts referred to gave authority to the Supervisors to make regulations as follows:

"(LAWS 1849, CHAP. 194.)

"SECTION 13. To make such laws and regu-
"lations as they may deem necessary and

"provide for the enforcing of the same, for the "destruction of wild beasts, thistles, and "other noxious weeds, to prevent the injury "and destruction of sheep by dogs, and to levy "and enforce the collection of any tax upon "dogs, and to direct the application of "such tax, and to provide for the protection "of all kinds of game, of shell and other "fish within the waters of their respective "counties; and all laws of this State now "existing in relation to preserving or destroy-"ing, killing and taking wild beasts or "birds, fish, eels and shellfish, are hereby "repealed, such repeal to take effect on the "first day of January, in the year eighteen "hundred and fifty."

"(LAWS 1875, CHAP. 482.)

*Preservation of Game and Fish.*

"SECTION 16. To provide for the protection "and preservation, subject to the laws of "this State, of game animals and birds, and "of fish and shellfish in all waters within "the territorial jurisdiction of the county, "and to prescribe and enforce the collection "of penalties for the violation of any laws "or regulations they may make pursuant to "the provisions of this subdivision."

4. The framers of Section 441 of the Criminal Code seem to have constructed that section from the 6th Section of Chap. 404 of the Laws of 1866, above cited, which was aimed

at both the *planting* of oysters and the taking of them from their natural beds in the waters of Richmond County by non-residents of the State, and from Sec. 1 of Chap. 87 of the Laws of 1879, above copied, which was aimed at the *gathering* of oysters from their *natural beds* by non-residents of the State. So far as planting is concerned, the prohibition, previously confined to Richmond County was extended over all the waters of the State.

5. This provision of the Penal Code was applicable to any of the waters of the State held in *private* ownership. It is extremely questionable whether it was designed, or should be held, to extend to waters owned by the State. It was probably designed, on the analogy of statutes making willful trespasses criminal, to afford a remedy more efficient than a suit for damages. The words, "the owner of the same or of the shore," seem to point to private ownership alone; and there was no policy, up to the time when the statutes from which this section was drawn were enacted, to exclude non-residents from the business of occupying public waters useful for no other purpose than cultivating oysters. The jealous exclusion of non-residents from useful business within the State has never been the policy of the great State of New York, still less where the business was one calculated to increase the supply of wholesome food.

The observation of Bradly, J., in the case of the People *vs.* Lowndes (130 N. Y., p. 463), if intended to include the State as being an owner, was not necessary to the decision, and was not to a point definitely argued. Upon this point the provisions of the act, chap. 584 of the laws of 1887, printed in the Appendix, are very pertinent.

5. We are now to turn to the situation of the plaintiff in error, as affected by this Sec. 441 of the Penal Code. He started out and prepared his bed and began his planting as early as 1867. Even had he been a non-resident of the State, he would have acquired at that time a full and perfect right to hold and maintain that bed as against everyone but the State; and even against the State until the license evidenced by the long continued practice and toleration had been revoked by some distinct act. The State could not have treated him as a trespasser. Moreover, its own express legislation above cited, of 1866, would have protected him.

But he was a resident of the State until 1872, and, of course, no question could be made as to the perfect acquisition of his right.

Can it be thought that it was the design of this Sec 441 of the Penal Code to *revoke* the license and permission under which the plaintiff in error had acted, upon the strength of which he had expended much labor and money, and to destroy the useful business which he had been carrying on? Surely, no

such interpretation can be sanctioned unless the language of the act compels it.

6. But there is no necessity for such a harsh interpretation. On the contrary, the language of the section does not permit it. The plaintiff in error has never planted oysters in Huntington Bay "without the consent of the owners of the same." It is not requisite that this *consent* should be in *writing*. Any evidence tending to show consent or acquiescence is sufficient. And, surely, the fact that from the first, and down to the time of the passage of this penal enactment, it had been the custom for all, without distinction of residence, to use the public waters of the State for this useful purpose, and had been protected in that use not only by the common law and the adjudications of the Courts, but by the express legislation of the State, is abundant proof of consent.

If any private individual or town authorities owning such land under water had so stood by, and seen a non-resident thus occupying their land, had encouraged him in such occupation, and protected him against strangers, could the occupant have been indicted and punished under this statute as having planted oysters "in the waters of this State without the consent of the owner of the same"? There is no reason for applying a different rule to the State. The State cannot be presumed to intend what "would be disreputable in an individual." (Marshall, C. J., in Grant *vs.* Raymond, 6 Pet., 218.)

*gather* oysters for him—an interference with the inalienable rights of property and a discrimination against non-residents quite beyond the legislative power of the State.

9. And if there were any remaining doubt concerning the propriety of the suggested interpretation, it would be removed by a reference to the subsequent legislative provisions contained in the Act of 1879, above referred to and printed in the Appendix. The first section of that act unmistakably intends to preserve and protect *all existing occupations* for the purpose of planting oysters, and the fifth section makes the rental exacted much less than in the case of future occupations. It cannot be that in this respect an unexpressed distinction was intended between residents and non-residents, for the fact was notorious that the existing occupations were by non-residents as well as by residents; and had any such distinction been designed, it would certainly have been expressed, because where that distinction was intended it was expressed, as in the fourth section.

The provisions of the first and fourth sections can be made to stand together by limiting the operation of the fourth section to the cases not before provided for.

To hold that grants of leases to present occupants could be made only when such occupants were residents would require us to read into the first section, at the end thereof,

the words, "and shall have resided in this State at least one year preceding the date of application." And even this would not make a consistent interpretation, for many occupations might cover, as that of the plaintiff in error did, more than two hundred and fifty acres, and the excess could not be leased to any one.

10. The manifest policy of this act was this: The land of the State under water suitable for the purpose of oyster planting was to be surveyed and leased for that purpose, and a revenue to be derived from it. All existing occupations were to be left unaffected, if the occupants wished to continue them and pay a rental of twenty-five cents per acre, and in such cases perpetual leases were to be given for the whole extent occupied. But, in respect to leases to new occupants, the privilege was to be confined to residents, the number of acres to be limited to two hundred and fifty, and the rental to be one dollar per acre.

This interpretation is consistent with justice and equity. It would have been an outrage for the State in seeking, not to reserve natural oyster beds for its own citizens, but the mere *bottom* of its public waters, where there were no natural oysters, to treat as trespassers such non-residents as had, under its own tacit permission and encouragement, and at great expense, prepared certain places for oyster cultivation and de-

posited there large quantities of young oysters, and compel them to lose their investment. No such design will be imputed to a great and sovereign State.

It should be observed, that the unnecessary and unwise discrimination in this act between residents, *and* non-residents in respect to the use of the bottom of public waters for the *cultivation* of oysters was abrogated by Chap. 321 of the Laws of 1893.

**Lastly.**—The judgment of the Court below should be reversed, and a new trial be ordered, with costs to abide the event.

JAMES C. CARTER,
Of Counsel for Plaintiff in Error.

# APPENDIX.

## Section 441 of Penal Code of New York.

Sec. 441. *Non-resident taking or planting Oysters.* A person who, not being at the time an actual inhabitant and resident of this State, plants oysters in the waters of this State, without the consent of the owner of the same, or of the shore, or gathers oysters or other shellfish from their beds of natural growth, in any such waters on his own account or for his own benefit, or the benefit of a non-resident employer, is guilty of a misdemeanor punishable by imprisonment not exceeding six months, or by fine not exceeding one hundred dollars, or both.

## Chap. 584.

An Act to promote and protect the cultivation of shellfish within the waters of this State, for the appointment of an additional Commissioner of Fisheries; to authorize the grant of franchises for the use of certain lands under water belonging to the State, and to make an appropriation therefor.

Passed June 16, 1887—three-fifths being present.

Section 1. The Commissioner of Fisheries, appointed under Chapter three hundred and nine, Laws of eighteen hundred and seventy-nine, and his successor in office, shall be known as the Shell-

fish Commissioner, and shall finish and complete the survey now being made, under his direction, of all the lands under the waters of the State suitable for use for the planting and cultivation of shellfish, and shall make a map thereof as heretofore provided. He shall finish and complete the survey now being made of all the beds of oysters of natural growth located in the waters of the State, and such beds of oysters of natural growth shall be set apart and preserved, and shall not be deemed to be included in the lands for which franchises are to be sold under the provisions of this act. Said Commissioner shall ascertain the occupants of all lands claimed to be in the possession or occupation of any person or persons, and no grant of lands so occupied or possessed shall be made, except to the actual occupant or possessor thereof; provided said occupant or possessor, within one year from the passage of this act, shall make application for and purchase the same.

SECTION 2. For the further purpose of this act, the Governor is hereby authorized to appoint an additional Commissioner of Fisheries, who shall be a man of experience in oyster culture, and who shall be a resident of Richmond, Queens, Kings, or Suffolk counties.

SECTION 3. Immediately after the passage of this act, the Commissioners of Fisheries shall meet at some place, to be designated by them, in the city of New York, for the purpose of making such rules and regulations as shall be deemed necessary as preliminary to hearing and granting applications for perpetual franchises for the purpose of shellfish cultivation on the lands under the waters of this State, mentioned in section one of this act,

suitable for planting and cultivation of shellfish. After such rules and regulations shall have been agreed upon and formulated, the said Commissioners of Fisheries shall proceed to grant franchises for the purposes of shellfish cultivation, as hereinafter provided. But no such franchise shall be granted until one month's notice of the application for a franchise or franchises shall have been given by posting in a conspicuous place, in the office of the Shellfish Commissioner, and in the office of the town clerk of the town nearest to the lands applied for.

SECTION 4. No grant shall be made to any person or persons who have not resided in this State for at least one year preceding the date of application, and no grant shall be made to any person, firm or corporation in excess of two hundred and fifty acres; and no person, firm or corporation shall be allowed to hold, at any one time, more than two hundred and fifty acres.

SECTION 5. When the conditions precedent to the granting of franchises, mentioned in the foregoing sections, have been complied with, the Commissioners of Fisheries are hereby empowered, in the name and behalf of the people of the State of New York, to grant, by written instruments under their hands and seals, perpetual franchises for the purposes of shellfish cultivation in the lands applied for under the waters of the State, for the consideration of not less than one dollar per acre, if the lands are unoccupied or unused, and not less than twenty-five cents per acre if the lands are in present use and occupation, and the right to use and occupy said grounds for said purposes shall be and remain in the said grantee, his legal repre-

sentatives or successors forever; provided only that the said grantee, his legal representatives or successors, shall actually use and occupy the same for the purposes of shellfish cultivation, and for no other purpose whatever. And the moneys received for the sale of such franchises shall be paid forthwith into the treasury of this State.

SECTION 6. The franchises thus granted shall be deemed to be personal property, and Courts of law and of equity shall have power, authority and jurisdiction to determine and enforce the rights of persons, firms or corporations thereto, as though such franchises were actually personal property owned and possessed by such persons, firms or corporations, and such franchises may be sold, transferred, assigned or conveyed the same as other personal property. Immediately after the receipt of the aforesaid instruments of conveyance, the grantee shall at once cause the grounds therein conveyed to be plainly marked out by stakes, buoys or monuments, which stakes, buoys or monuments shall be continued by said grantee, his legal representatives or successors.

SECTION 7. The said Commissioners are hereby authorized to appoint and employ a clerk whose compensation shall not exceed fifteen hundred dollars per annum, which compensation and the necessary expenses for carrying out the provisions of this act shall be paid by the treasurer upon the warrant of the Comptroller, to the order of the said Commissioners, upon vouchers to be approved by the Comptroller. The said clerk shall give a bond, to be approved by the Comptroller, in the penal sum of five thousand dollars, for the faithful performance of his duties.

SECTION 8. The provisions of this act shall not be deemed to limit or interfere with the powers of the Commissioners of the Land Office to grant to owners of uplands adjacent to such fisheries any of the lands under the waters of this State as is now provided by law. But in case any grant shall be made by the Commissioners of the Land Office of any land actually occupied and in use, under the provisions of this act, for the cultivation of shellfish, such grant by said Commissioners of the Land Office shall be subject to the right of the occupancy to occupy such grounds for two years thereafter for the cultivation and removal of the shellfish there planted.

SECTION 9. This act shall not apply to nor be held to affect in any way lands under water owned, controlled or claimed under colonial patents or legislative grants by any town or towns, person or persons in the counties of Suffolk, Queens, Kings and Richmond; lands under the waters of Gardiner's and Peconic Bays, ceded by the State to the county of Suffolk, pursuant to chapter three hundred and eighty-five of the laws of eighteen hundred and eighty-five; lands under water in Jamaica Bay: lands in the jurisdiction of the towns of Hempstead and Jamaica or in the county of Westchester.

SECTION 10. The sum of three thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated, payable by the treasurer on the warrant of the Comptroller to the order of the said Commissioners for carrying out the provisions of this act, upon vouchers to be approved by the Comptroller.

## Memorandum of Legislation of New York relative to oysters, &c.

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LAWS OF 1807, CH. 100:

No person shall stake off any oyster beds on the south or west side of Staten Island or prevent any person from taking oysters off said beds.

LAWS OF 1813, CH. 35, § 23:

The right of oystering in the harbors of North Hempstead is given to the inhabitants of Hempstead, and to the inhabitants of North Hempstead a like privilege is given in the harbors of Hempstead.

LAWS OF 1813, CH. 62, § 11:

No one shall stake off any oyster bed on south and west side of Staten Island to prevent any person from taking oysters therefrom. Free use of State land below high water mark on said island is secured to any citizen of this State.

LAWS OF 1817, CH. 211:

No person residing out of this State shall take any shell or other fish in any waters of this State or on the shores adjoining such waters.

LAWS OF 1831, CH. 203:

No person shall take oysters in the Hudson River north of the County of New York, in the months of May, June, July and August.

No person shall take oysters from their beds in the Hudson River within the limits aforesaid for the purpose of replanting them in another State.

LAWS OF 1840, CH. 267.

No person shall take oysters in the waters of Richmond County with a dredge; oysters planted on private property excepted.

LAWS OF 1849, CH. 435:

No person shall take oysters in the harbors, etc., within the town of North Hempstead, Queens Co., during the months of June, July and August. No person other than a resident of North Hempstead shall take any oysters from the above harbors for the purpose of selling them or of having them replanted in a place out of said town. This act is to continue in force till Jan. 1st, 1850.

LAWS OF 1851, CH. 478:

No person shall take oysters from the Harbor, N. Y. Co., during months of June, July and August.

Owners and lessees of lands adjoining Harlem river may plant oysters in front of their lands (where none are now planted by others): they must plainly designate the bed by a sign: they shall then have exclusive property in the oysters on the bed.

LAWS OF 1859, CH. 468:

Owners and lessees of land on Jamaica Bay and tributary streams, Queens Co., may plant oysters extending from low water mark into the bay, not exceeding four rods in width, and in the creeks not exceeding half the width of said creek: No one person or association shall plant such bed more than quarter of a mile long.

Any owner or lessee so planting shall designate

the locality by stakes at corners of bed ; and shall erect suitable monument on shore, indicating such planting.

No person shall dig or catch oysters on any locality planted as above, without the owners' consent.

LAWS OF 1863, CH. 493 :

All persons for six months past inhabitants of Hempstead or Jamaica, may plant oysters in public waters of said towns. Those planting shall have exclusive right to all oysters on the beds where they were planted.

Such persons may plant a bed under public waters not to exceed two acres ; after planting they must clearly designate the locality ; they must plant with not less than four hundred bushels to the acre.

Right to plant forfeited if not used for one year.

Persons removing from said towns shall have two years to transplant their oysters.

LAWS OF 1864, CH. 574 :

All persons, for six months past, inhabitants of towns in Queens Co. may plant oysters under public waters of towns of which they are inhabitants, where no natural or planted bed already exists. Such beds must not exceed five acres, and must be clearly defined by stakes or otherwise.

Proof that no natural or planted bed already exists, to be made before a Justice of the Peace, who is to issue a certificate to that effect.

An annual rent of $5 per acre so occupied is to be paid.

Those so planting oysters to have exclusive rights to the beds.

The planting must begin within six months from filing above certificate. Those abandoning lands forfeit rights after six months. Those removing from the town have six months allowed to remove their oysters.

No persons other than owner of land adjacent to portion so selected shall have right to plant oysters within twenty rods of land of such owner.

LAWS OF 1864, CH. 575: Rep'd L. 1866, Ch. 404.

No person can interfere with oysters now planted or to be planted on shores or under waters of Richmond Co. without written permission of owners of the same.

LAWS of 1865, CH. 343:

All persons, for six months past, inhabitants of Queens Co. may plant oysters in any public waters within said county (except Hempstead harbor, Jamaica and Hempstead bays, and Oyster Bay harbor) where there is no planted bed already existing. Beds not to exceed three acres, and must be clearly marked out; to be planted with not less than fifty bushels to the acre. Planting must begin within six months, or rights will be forfeited, Those so planting shall have exclusive right to such beds. Rights forfeited by non user for one year. Persons leaving the county lose their rights, but have two years to remove oysters. No person may dredge for oysters in any waters of Queens Co. except in Oyster Bay.

Am'd L. 1866, Ch. 399. Am'd L. 1879, Ch. 402. Am'd L. 1866, Ch. 399.

LAWS OF 1866, CH. 306: Am'd L. 1872, Ch. 666. Rep'd as to town of Huntingdon, L. 1880, Ch. 240.

All persons, for six months past, inhabitants of Islip or Huntington, in Suffolk Co., may plant oysters in public waters of Great South Bay within

either of said towns. Bed to be planted where there is no natural or planted bed already existing, and not more than two acres in a bed ; beds to be clearly marked out by stakes or otherwise, and to be planted with not less than four hundred bushels to the acre. Those so planting shall have exclusive right to such beds. Rights forfeited by non-user for one year. Persons ceasing to be inhabitants lose their rights, but have two years to remove oysters.

LAWS OF 1855, CH. 399 :

Am'd L. 1879, Ch. 402.

Amends Ch. 343, Laws of 1865, by restricting the planting of oysters to places where there is no *natural* or planted bed of oysters. Further amendments provide that no person shall dredge for oysters in waters of Queens Co. except in Oyster Bay and Cow Bay ; and only residents of North Hempstead shall dredge in said Cow Bay. The natural bed in Little Neck Bay is defined as being between low water mark and a distance of 500 feet therefrom towards centre. Beyond this the word "natural" above does not apply. With this exception, persons planting oysters on natural beds shall have till August 15, 1866, to remove said oysters, and after that time shall cease to have exclusive control over such natural beds.

LAWS OF 1866, CH. 404 :

No persons may take or disturb oysters now, or to be planted under public waters of Richmond Co., or under State waters surrounding said County, except the owners thereof.

No person may dredge or drag upon beds that are natural (and not planted) in the aforesaid waters.

No person not an inhabitant of the State shall plant oysters in waters of said county, or surrounding said county, unless owner's consent is first obtained. Nothing here said authorizes planting of oysters on natural beds. Those so planting, and those staking off beds, but not planting them in good faith, not entitled to privileges of this act. Laws of 1864, Ch. 575, repealed.

LAWS OF 1866, CH. 753: Am'd L. 1872, Ch. 463.

To take unlawfully the oysters of another lawfully planted in any rivers, bays, sounds, etc., within State jurisdiction is made a misdemeanor.

LAWS OF 1868, CH. 734:

All persons for six months past, inhabitants of Gravesend and Flatlands, Kings Co., may plant oysters under public waters within their respective towns. No one person may use more than three acres. Bed must be distinctly marked out. Permit of Justice of Peace and Supervisor of respective town must first be obtained. Permit must show locality and name of person and to be filed with town clerk. Before permit is granted proof must be made that such premises are not a natural bed, and are not already so occupied; those so planting to have exclusive right to such beds. Right to be forfeited if planting does not begin within six months, or if abandoned for six months, or if person ceases to be inhabitant of said town or dies. In every such case person or his representative to have six months to remove such oysters.

LAWS OF 1870, CH. 93:

Privileges granted by L. 1865, Ch. 343, as amended by L. 1866, Ch. 399, are extended to waters of Jamaica and Hempsted Bays.

Rep'd L. 1890, Ch. 308.

LAWS OF 1870, CH. 234:

No person shall take any oysters in waters of South Bay, Suffolk Co., with a dredge or drag. No person shall take any oysters from any public or private bed, or in any waters of said South Bay except between sunrise and sunset. No person shall take any oysters, spawn or seed oysters in said waters after June 15, and before September 15.

Supplemented by L. 1872, Ch. 667.
Am'd L. 1887, Ch. 183.

LAWS OF 1871, CH. 639:

All persons for one year past, inhabitants of Jamaica and Hempstead, Queens Co., may plant oysters in public waters in said town; none except such inhabitants shall have the right. Beds not to exceed three acres, must be clearly marked out, and must be planted with not less than 50 bushels to the acre. Proof must be made to Board of Auditors that land selected is not already a planted bed, and as to residence; certificate thereupon issues and is to be filed in town clerk's office. Planting must begin within six months after granting of certificate. Annual rental of $5 per acre to be paid to town. Rights forfeited by non-user for one year: persons leaving said town have one year to remove their oysters.

Persons having oysters planted under any other act have until Jan. 1st, 1872, to remove same; otherwise their exclusive right thereto shall cease unless they acquire rights under this act.

No person shall dredge for oysters in any of said waters.

LAWS OF 1872, CH. 483:

Amends L. 1866, Ch. 753, by extending its provision to catching, disturbing or interfering with

said oysters with dredges, rakes, drags, tongs, or other implements.

LAWS OF 1872, CH. 666:

Rep'd as to town of Huntingdon, L. 1880, Ch. 240.

Amends Ch. 306 of Laws of 1866, by extending the prohibition to plant on natural beds, to planting on natural beds of oysters.

Those who have already planted oysters on natural clam beds shall have two years to remove same. After that, such oysters remaining to become public property.

LAWS OF 1872, CH. 667:

Supplements Laws of 1871, Ch. 639, by providing that auditors, when due proof is made as required, must issue certificate whether person resides in same town where land applied for is situated or not; application to be made to Board of Town where land is situated.

LAWS OF 1874, CH. 549:

Am'd L. 1878, Ch. 142.

(This act is entitled "An Act to provide for the planting and protection of oysters in those portions of the Great South Bay lying in the town of Islip, Suffolk Co., wherein the taking of clams cannot be profitably followed as a business.

All persons of full age and for one year past inhabitants of Islip, Suffolk Co., may, with consent of Oyster Commissioners, and complying with provisions, locate a lot not exceeding four acres under public waters of said bay within said town, and have exclusive right to it.

Provision is made for the appointment and qualification of three Oyster Commissioners.

Commissioners on application of such inhabitant must locate lot, which must be clearly marked out.

They must make maps and surveys; their decision on questions as to location, etc., to be final upon paying fee to locate lot of not more than $10, and yearly rent of not more than $1 per acre; certificate thereof to be issued. Commissioners have option to forfeit right if lot is not planted with at least 100 bushels of oysters and shells within one year after issuing of certificate, or, if rent is not paid on or before April 1st, certificate of forfeiture to be filed with Town Clerk. Persons removing from Islip may sell their lots to inhabitants of said town—no person may possess more than one lot by purchase or otherwise. Occupants under L. 1866, Ch. 306, to have preference to their beds.

LAWS OF 1878, CH. 142:

Amends Laws of 1874, Ch. 549, by granting privileges to inhabitants of Islip or Babylon (instead of Islip alone), and restricting the locality to the waters of Great South Bay, in either of said towns where the taking of clams cannot be profitably followed as a business.

Corresponding change is made in board of Commissioners to examine if clam business can be profitably followed on lot applied for. Marking out of lot not to interfere with net fishing.

Provisions of this act not to impair rights under act of 1874.

Am'd L. 1879, Ch. 67.
Am'd L. 1882, Ch. 178.

LAWS OF 1878, CH. 302:

No non-residents, either on their own account or for any employer, can gather oysters in waters of this State on board of a canoe, scow, etc., unless such employer being an actual resident employs them to gather such oysters for his own benefit.

Dredging by steam power, forbidden. No dredge to exceed 30 lbs. in weight.

LAWS OF 1879, CH. 87:

Amends, Ch. 302, L. 1878, by limiting residents therein to "residents for the period of six months."

LAWS OF 1879, CH. 251: Am'd L. 1889, Ch. 9.

Corporations may be formed in Suffolk County for the purpose of promoting the planting, cultivation, etc., of oysters.

LAWS OF 1879, CH. 384:

No person may occupy public waters for planting oysters in town of Hempstead, without first obtaining license described in L. 1871, Ch. 639. License shall not be given to occupy more than three acres.

LAWS OF 1879, CH 402:

Repeals that portion (§ 7) of L. 1865, Ch. 343, and of L. 1866, Ch. 399, which refers to dredging, in so far as same relate to waters of Queens Co., lying on north side thereof, except that portion of waters of Hempstead harbor lying south of a line drawn from centre of Sea Cliff dock, on east side of said harbor to centre of Mott's dock on west side thereof.

LAWS OF 1880, CH. 240:

Repeals L. 1866, Ch. 306, as amended by L. 1872, Ch. 666, so far as said acts affect present town of Huntington.

LAWS OF 1880, CH. 453:

No person shall take oysters, natural or planted, in State waters in the evening or night between one half hour after sunset and one half hour before sunrise at any place on south side of Staten Island be-

tween a line extending due south from the point of the beach at Great Kills in Southfield, Richmond Co., and a line extending due south from Ward's Point in Westfield, Richmond Co.

LAWS of 1882, CH. 178:

Amends L. 1878, Ch. 302, by allowing owners of legally planted bed to use steam and heavier dredges to remove oysters from such beds.

This act not to apply to waters of town of Oyster Bay, Queens Co., or waters of Great South Bay.

LAWS OF 1882, CH. 410, § 767. (CONSOLIDATION ACT):

No person shall take oysters from Harlem River, N. Y. Co., in any way during months of June, July & August.

§ 768. Owners may plant oysters in front of their lands on Harlem where none have already been planted, and must put up sign. Thereupon they have exclusive right to said oysters.

LAWS OF 1884, CH. 385:

All title of people of New York to lands under water of Gardiner's and Peconic bays, Suffolk Co., is ceded to Suffolk Co., to be controlled by supervisors thereof, reversion to State when said lands cease to be used for oyster culture.

Supervisors to appoint Oyster Commissioners. Any person for six months past a resident of Suffolk Co. may apply for bed of not more than four acres. Commissioners to convey said lots, if there is no natural growth of clams there or no natural shell bed, for one dollar per acre with expenses of survey, subject to grants of Land Office Commissioners. Grantee to stipulate that he will plant specified

quantity of oysters within one year. Commissioners to settle disputes.

LAWS OF 1886, CH. 300:

No refuse injurious to oysters is to be thrown into any of the public waters of this State.

LAWS OF 1887, CH. 183:

Amends L. 1871, Ch. 183, by changing proof of residence and providing for yearly certificates.

Rights to be forfeited after non-user for 6 months.

LAWS OF 1887, CH. 584: Rep'd L. 1893, Ch. 321.

Provides for appointment of Shellfish Commissioner. Survey of natural beds in State waters to be completed, natural beds to be set apart and preserved, no franchises there to be granted under this act. No grant of lands already occupied to be made, provided occupant applies for same within one year. One month's public notice of the granting of franchises to be given. Only residents for at least one year past can apply. No person, firm or corporation can apply for or hold more than 250 acres. Perpetual franchises for shellfish cultivation to be granted at certain prices. Franchise to be personal property, and so transferable. Grounds granted to be plainly staked out. Such grants to be subject to future grants by Land Office Commissioners: provided that grantees under this act shall have two years to remove their oysters. This act not to affect lands under water owned under Colonial patents or legislative grants in Suffolk, Queens, Kings and Richmond Cos., or waters of Gardiner's and Peconic bays ceded by State; or

waters in Jamaica Bay, or within towns of Hempstead and Jamaica, and in Westchester Co.

LAWS OF 1888, CH. 279:

Title of State to lands under water within town of Huntington is ceded to trustees of said town within certain specified boundaries. Subject to rights of Land Office Commissioners and of riparian owners, and without prejudice to rights, if any, of those who have oysters planted on said lands.

LAWS OF 1888, CH. 491:

Amends § 640 of Penal Code by prohibiting the "interfering" and "disturbing" as well as the taking of oysters belonging to another.

LAWS OF 1888, CH. 526:

Amends § 442 of Penal Code by limiting the prohibition to use certain dredges to take oysters, to "beds of natural growth in the waters of this State."

LAWS OF 1889, CH. 9:

Amends Ch. 251, Laws of 1879, which provides for the formation of corporations in Suffolk Co.

LAWS OF 1890, CH. 308:

No person shall take oysters in waters of Great South Bay, except between sunrise and sunset and not at all after June 1st and before Sept. 1st.

No person shall take away any oyster shells from public grounds within said waters; same shall be returned to place where caught within ten minutes.

No person shall take oysters in said bay with blade or scraper tongs.

LAWS OF 1892. CHAP. 488. (GEN. LAWS, CH. 31, ART. VIII).

Am'd L. 1893, Ch. 321. Am'd as to §§ 189, 191, L. 1893, Ch. 593.

No substance injurious to oyster culture shall be thrown into any of the public waters of this State. Oysters shall not be taken from Hudson river north of New York county between May 1st and September 1st, nor at any time for the purpose of conveying them to another State to have them replanted. Oysters shall not be taken from the Harlem river between June 1st and September 1st. None but residents of this State for six months past shall gather shell-fish from the waters of this State, except when such non-resident is employed for that purpose by a person authorized to gather the same. No steam dredge or dredges weighing over fifty pounds shall be used on natural oyster beds. No oysters shall be taken between a half hour after sunset and a half hour before sunrise from the waters on the south side of Staten Island lying between a line extending due south from Point of the Beach at Great Kills, and a line extending due southwest from Ward's Point, in the town of Westfield. No oysters shall be taken from South Bay, Suffolk county, between June 1st and September 1st, or between sunset and sunrise at any time.

LAWS OF 1893, CH. 321.

Amends Art. VIII, of game laws. Commissioners shall not lease natural oyster beds unless they shall have ceased for five years to yield remuneratively. This act shall not affect lands under waters claimed under colonial patents or legislative grants by any town or persons in Suffolk, Queens, Kings or Richmond counties, lands under waters of Gardiner's and Peconic Bays, ceded by State to

Suffolk county, or in Jamaica Bay, or in the jurisdiction of towns of Hempstead and Jamaica, or in Westchester county.

Laws of 1887, Ch. 584, repealed.

Laws of 1893, Ch. 573.

Amends § 189 of a game law (Art. VIII). No oysters shall be taken between a half hour after sunset and a half hour before sunrise, except in Kill von Kull and the Arthur Kill.

Amends § 191 of game law (Art. VIII). No steam dredges or dredges weighing more than fifty pounds shall be used on natural oyster beds.

FILED.
DEC 12 1893
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

## OCTOBER TERM, 1893.

No. 117.

THEODORE LOWNDES,
*Plaintiff in Error,*

*vs.*

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

# BRIEF FOR DEFENDANTS IN ERROR.

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# Supreme Court of the United States.

WRIT OF ERROR FROM

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF NEW YORK.

IN LAW.

THEODORE S. LOWNDES,
Plaintiff in Error,

vs.

THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON,
Defendant in Error.

No. 117. October Term, 1893.

## BRIEF OF THE BOARD OF TRUSTEES, DEFENDANTS IN ERROR.

This action is brought to this Court on writ of error from the U. S. Circuit Court, Eastern District of New York. The action was originally commenced in the Supreme Court of the State of New York, and removed to the U. S. Circuit Court on the ground that the plaintiff in error is a resident of the State of Connecticut.

It is an action of ejectment. The premises in question comprise about 300 acres lying under navigable waters of Huntington Bay, a body of water connecting

with Long Island Sound, Town of Huntington, Suffolk County, N. Y.

The defendant in error claims title (subject to free right of navigation), and an exclusive right to the shell fisheries, by virtue of three ancient charters or patents granted by the Colonial Governors of the Province of New York, ratified by Act of the Colonial Legislature, and by the subsequent Constitutions of the State of New York. They also claim by virtue of a grant from the State of New York in the nature of a quitclaim deed.

The defendant has planted oysters thereon, being and having been a non-resident of the State since 1872, and claims the right to use it for that purpose and sets up a claim of adverse possession.

The complaint or declaration is contained on pages 1, 2 and 3 of the record; the answer on page 3.

The action came on for trial before Judge LACOMBE and a jury at Brooklyn, N. Y., November 14th, 1889, and resulted in the Judge directing a verdict for the plaintiff, now the defendant in error.

The defendant, now plaintiff in error, sent out a writ of error to this Court, but attached to it no assignment of errors (see pp. 111 and 112 of Record).

The following is a brief synopsis of the evidence given on the trial on behalf of defendant in error.

Patent from Richard Nicolls, Governor-General under his Royal Highness James, Duke of York, and dated November, 1666 (pp. 14 and 15 of Record).

Patent from Thomas Dongon, Captain-General, Governor-in-Chief, etc., dated August, 1688 (pp. 15 to 21 of Record).

Patent from Benjamin Fletcher, Captain-General, etc., dated October 15th, 1694 (pp. 22 to 28 of Record).

Patents from Charles II. to Duke of York, dated 1664 and 1674 (pp. 32 to 39 of Record).

Colonial Laws Act of May 6th, 1691.

"An Act for settling, quieting and confirming unto the cities, towns, manors and freeholders within this province their several grants, patents and rights respectively, etc. (pp. 39 and 40 of Record).

Sections of Constitution of State of New York hereinafter set forth in full.

Sections 15 and 16 of Chapter 64, Laws of New York, 1788, authorizing use and regulations by freeholders and inhabitants as to use of common lands, etc., pages 41 and 42 of record.

Chapter 584 of Laws of New York, 1887, an act in relation to disposition of lands of State for oyster culture. Chapter 279, Laws of New York, 1888, ceding all interest of State in the lands in Huntington Bay to Board of Trustees of Town of Huntington for oyster culture.

Act of Board of Supervisors of Suffolk County prohibiting shellfishing by any one but residents (p. 43 of Record.)

Laws of New York ceding lands in Long Island Sound to United States for purposes of lighthouses, etc. (pp. 42 and 43 of Record).

Records of Town of Huntington showing exclusive claim to fisheries, etc. (pp. 44 to 54, inclusive). Also leases and deeds of land in Huntington Bay (pp. 55 to 59 and 62 to 71 of Record).

Evidence showing trustees of freeholders under ancient patents have been continuously elected to date of trial (pp. 71 and 73 of Record).

Chapter 492, Laws of 1872, showing Legislature abolished old trustees and designated other officers as their successors.

Evidence showing the establishment of boundary line between New York and Connecticut running through Long Island Sound (pp. 72 and 73 of Record).

Evidence of size of Huntington Bay (pp. 76 and 77 of Record).

Evidence of the uses Huntington Bay had been put

to, what it has always been known as, and its surroundings (pp. 78 to 83 of Record).

Notice served on plaintiff in error (p. 57 of Record). Evidence of what this body of water was called contemporaneous with the patents issued (pp. 29 and 30 of Record).

Evidence on behalf of plaintiff in error.

Evidence of uses made of these lands and his claims pp. 85 to 88); also, evidence of uses made of the lands personally (pp. 93 and 94 of Record).

Motion made by defendant in error for direction of verdict (p. 106 of Record).

Requests of plaintiff in error (p. 107 of Record).

The question at issue here involves the shell fisheries, and as such necessarily involves the question of the title to the bottom, and has no relation to what is termed floating fisheries. It is a question of immense importance, both in its bearing on the question of title to property involved and in the results on the food supply, in the ability to properly control the lands for the culture of oysters.

In the first regard all the Long Island towns were founded and established by patents of a similar kind to those establishing the Town of Huntington. These patents confirmed what had been done in obtaining title by inhabitants; at the time they were issued, and granted the other lands to the trustees to dispose of. But a small part of the lands had been actually taken up; consequently, the title to the larger part of the lands on Long Island came through these patents. Patents were also issued granting large tracts of land along the Hudson River, the Mohawk Valley and to the City of New York. The Dongan charter to the City of New York went to low water mark, and the Montgomerie charter 400 feet beyond and are those under which the city by ratification has held the title thereto.

Many thousand acres of land under water are alone covered by the patent to Huntington. To the other towns large bodies of water also were granted; for instance,

Cold Spring and Oyster Bay Harbors, Hempstead Harbor, Port Jefferson Harbor, and about all of Great South Bay. The towns have leased and sold this not only for oyster cultivation, but for the building and erection of docks and the beneficial enjoyment of the uplands; so that a decision of the question, that will find this patent is not good, will be far-reaching, and its effects will fall upon many people and towns, adversely to the present holding, as the State Courts have sustained these titles.

Secondly, experience has proved that nature cannot be depended upon, as opposed by the greed of man, to supply a proper and reasonable supply of oysters, according to the increased demand of the country, as has long been learned concerning the floating fish. First to learn and recognize this fact, we believe, were the people of Connecticut, who about 25 years ago passed an act granting its lands under waters for the private cultivation of oysters. Artificial means of propagation were discovered, and it has proved an immense success. Other States are following in line, notably New York; but, long before the State acted, the people of these towns, owning these lands, learned these facts and had made large disposition thereof for oyster culture, which has proved of general benefit to all concerned.

There being no assignment of errors, the actual questions involved in this case, as we understand them, are:

Did the defendant in error obtain title to the lands in question under the ancient grants and the acts confirming them?

And the main question, we think, in this case is (1st) whether Huntington Bay is within the limits of the bounds given in the patents. (2d) If so, do the patents convey a good title and exclusive right of shell fisheries? (3d) Has the plaintiff in error gained any right in these lands as he claims by adverse possession?

If all these questions are answered adversely, then: (4th) Did the town get title under the ceding Act of 1888?

## POINT I.

### Huntington Bay is within the limits of the patents.

No question is made but that it is within the east, south and west bounds, but the claim is made that it is not within the north boundary given. The north boundary given is the Sound, and it is stated in the patent of 1666, as follows: "on the North, to be bounded by the Sound running betwixt Long Island and the Main" (p. 14 of Transcript). Patent of 1688, "on the North, to be bounded by ye Sound running betwixt Long Island and ye main" (p. 25 of Transcript). Patent of 1694, "on the North, by the Sound that runs betwixt our said Island, Nassau, and the main continent" (p. 25 of Transcript).

Long Island was originally called "Nassau" or "Nassaw."

Its northern boundary being the Sound, it was within the limits, if Huntington Bay; was not part of the Sound itself.

The maps show its physical position, lands on the east, south and west, except where the inlets exist to Northport, Lloyds and Huntington harbors; at its southern extremity it is east and west about one and eight-tenth miles wide (p. 77 of Record). At its narrowest part, north of this, it is one and three-tenths miles wide, and its depth, north and south, about its centre, is two and eight-tenths miles (p. 76 of Record). It will be noticed it is narrower towards its outlet than at its southern extremity.

It was called and known as Huntington Bay, contemporaneous with the granting of the patents. In the grant of Eaton's Neck to Baldwin, June, 1667 (p. 29 of Record), this language is used, "Neck of land commonly called Eaton's Neck, and being in the East Riding of Yorkshire, upon Long Island

on the north side of said island to the east of *Huntington Bay.*"

In the bill of sale of Baldwin to Bryan, July, 1668, it is called "*Huntington Harbor*" (p. 30 of Record). In both these cases it shows it was not then called Long Island Sound, and this shows the intent of the grantor.

From that time to this it has been known as Huntington Bay, and has never been considered a part of Long Island Sound. Jonas S. Higbee says (p. 78 of Record): "I am sixty-eight years of age; that body of water has been named Huntington Bay always. My father was eighty years old when he died—eighty—he has been dead twelve years. I have heard him speak of it always as Huntington Bay." Cornelius Suydam (p. 81 of Record) says: "I am seventy years old. I am familiar, and have been from my boyhood, with the waters between Lloyd's Neck and Eaton's Neck. They have always been called Huntington Bay." Joseph A. Scudder (p. 79 of Transcript) says: "I reside at Northport. I have made it my home there all my days. I am in the neighborhood of seventy-seven years old. I have been familiar all my younger days with the waters between Eaton's Neck and Lloyd's Neck and East Neck. They have always been called Huntington Bay." There is no evidence, by record or otherwise, to dispute this.

It is clear, then, that this body of water at the date of the patents was and ever since has been known as Huntington Bay, and a body of water distinct from Long Island Sound.

The plaintiff in error asks how are you going to determine where the Sound ends and the bay begins? We answer as in every other body of water of this kind, the boundary line is a line drawn from headland to headland; when you get beyond this, on the one side, you are in the sound; on the other side, in the bay. All harbors, bays and havens have outlets, and the line is thus defined; they might as well claim Long Island Sound is the Atlantic Ocean, and

say, "How are you going to distinguish where one commences and the other ends?"

This body of water is not a mere indentation in the shore; it is narrower at its head, way inland, than further north, and only wider on the outside line because one headland does not extend as far north as the other.

The words of the patents justify the construction that it is within the limits. Example from Fletcher patent (p. 22, fol. 85, Record): "Together with all and singular the havens, etc., rivers, riverlets, waters, lakes, ponds, brooks, streams, beaches, , , harbors, highways, easements, fishing, fowling, hunting, &c., &c., within the limits and bounds next above mentioned, belonging or in any wise appertaining, &c., &c."

But it is said that in the case of Ackerly against Robins, 91 N. Y., 98, the reasoning of the Court would exclude this Bay. We do not so understand it. In Strong vs. Brookhaven, 60 N. Y., page 72, the Court had said that the boundary was the ocean and between that and the bay was a sandy beach; consequently, the bay was within the limits. And the Court in Ackerly vs. Robins applied the same reasoning because the facts were the same, but they did not say it was necessary that there should be land north of the waters claimed in order that such waters should be within the patent. The land in both these cases cited clearly indicate that the body of water claimed, in one case, was not a part of the sound, and, in the other, not a part of the ocean. But if it clearly appears that, as in this case, the northern boundary is a well-known body of water, and south of that, though adjoining it, is another well-known body of water, that such facts would not serve as well to define the intent of the language used in the patents as the fact that land adjoined such body of water; to wit, the sound. And this is sustained by the later case of

the Town of North Hempstead against Thompson, 8 N. Y. State Rep., 901 ; affirmed, 115 N. Y., 635.

Another element in favor of this construction is stated by Chief-Justice CHURCH in 60 N. Y., *Id.*, p. 72 : "The usage of the parties is important in construing the terms of an ancient grant."

The Town of Huntington in its town meetings and through its trustees have always claimed and asserted ownership of this bay. It is true that only in late years has there been any demand for its use for oyster culture, or in fact for any purpose, but so far as there has been any call for its use the town and its trustees have asserted ownership.

In a general way the people in town meeting assembled at an early date claimed to exclude foreigners from its bounds, but the first actual occupancy of any part of the lands for dock purposes was that of William C. Stout and others under a lease from the Board of Trustees, dated July 20, 1856, introduced in evidence (see. p 55 of Record).

J. S. Higbee gives the location of this land about the centre of the head of the bay (p. 79 of Record).

In 1859 notice was given by the Board of Trustees to several parties, including this plaintiff in error, to desist from staking out any grounds and planting oysters thereon within the borders of the town (p. 51 of Record).

Lease to N. S. Ackerly for digging gravel, which extends 350 feet under the waters of Huntington Bay and 500 feet under waters of Northport harbor (p. 55 of Record).

Deed of trustees to Abbie A. Baldwin of a strip of land 50 wide along the head of the bay at the west end and adjoining Huntington Gut (p. 56 of Record).

Lease for oyster culture to Charles Haines, 25 acres, etc. (p. 58 of Record).

Leases as follows by the Board of Trustees for oyster culture, all located on the map of Huntington Bay : To Edward Thompson, parts of lots 18 and 19, $31\frac{45}{100}$

acres (p. 62); to Charles Haines, southerly half of lot No. 101, whole of lots 100 and 104, part of 103, and in all 40 acres (p. 63 of Record).

To N. S. Ackerly, parts of lots 16 and 17, $24\frac{16}{100}$ acres (p. 63 of Record).

To Ed. B. Fox, lot 99, part of 98, 105, 106, and in all 40 acres.

To D. K. Cole, parts of lots 7, 8, 9, 32, 33 and 34, in all $30\frac{10}{100}$ acres (p. 63 of Record).

To Henry B. Mulford, parts of lots 1, 2, 3, 4, 5 and 6, in all $20\frac{95}{100}$ acres (p. 64 of Record).

To H. L. Washburn, 20 acres.

To H. L. Washburn, twenty acres (p. 64 of Record).

At page 77 Oscar Darling gives the location of the lands leased to Huntington Co., to N. S. Ackerly for gravel purposes, the land on which dock is built and land sold to Baldwin and etc.

Edward Thompson describes what has been done to and on the lands leased for oyster culture (pp. 81 and 82 of Record). Higbee says (p. 78 of Record) that he was employed by N. S. Ackerly to take charge of his gravel business about one year.

It is pertinent to call also the attention of the learned Court at this place to the recognition of the rights of the town under this and similar patents. By Chapter 584, Laws of 1887, relating to granting by State of lands for oyster culture, Section 9 reads: "This act shall not apply to or be held to affect in any way lands under water owned, controlled or claimed under colonial patents or legislative grants by any town or towns, person or persons, in the Counties of Suffolk, Queens, Kings or Richmond; lands under the waters of Gardiners and Peconic Bays, ceded by the State to the County of Suffolk, pursuant to Chapter 385, Laws of 1885, lands under water in Jamaica Bay, lands in the jurisdiction of the towns of Hempstead and Jamaica or in the County of Westchester."

The State expressly disclaims any right to dispose of the lands covered by these colonial patents.

Again, the evidence of the witnesses for the defendant in error shows that this body of water has always been in use as a harbor or haven by vessels engaged in commerce. The cross-examination of the witnesses for the plaintiff in error substantially corroborates this.

We further submit to this Court whether there is not an important difference between a grant to a private railroad corporation, founded on an Act of the Legislature of the comparatively new State of Illinois, and the Royal grants to the Town of Huntington, made to it as a municipal corporation and for purposes of settlement and government; made under another sovereignty more than a hundred years before the State of New York existed, ratified by the legislative power of the Colony by the treaty of peace at the close of the Revolution (see 9 Art. Treaty, Nov. 19, 1794), securing the same tenures of property, and ratified by the people of the State through constitutional provisions hereinafter quoted?

In construing these colonial grants, may we not measure the force and effect of these instruments in some degree by the laws in force as interpreted by the courts when the grants were made? As we trace title to the King of England, may we not see by what tenure he held tide waters and what he had power to grant as throwing light on what he intended to grant and did grant? It seems to be conceded by all that the Government of Great Britain claimed its territories in America by virtue of the right of discovery. It is equally undisputed that the title to all lands embraced within the discovered territories vested in the King, and that this title included as well the rivers and seas within the international limit as the dry lands.

Johnson vs. McIntosh, 8 Wheat., 595.

In the case of the Attorney-General vs. Richards, in the Exchequer, the information stated that "by the royal prerogative the sea, and the sea coasts, and as

far as the sea flows and reflows, between the high and low water mark, and all the ports and havens of the Kingdom belong to his Majasty" &c. Angell, in his excellent treatise on tide waters, page twenty says: "The right of property in tide waters in England is moreover vested in the King, not merely on the principle that he is the universal occupant, but on the principle of his being the fountain from whence, in contemplation of law, all authority and privilege proceed; to the King of England is therefore not only assigned the sovereign dominion of the sea adjoining the coast, and over the arms of the sea, but in him is also vested the right of property in the soil thereof."

The Colonial grants to Huntington were given pursuant to the two charters given by King Charles Second to the Duke of York, dated respectively 1664, 1674, in evidence here. The first of these charters invested the Duke with governmental powers. He was authorized "to govern, punish, pardon and rule, make laws," etc. He promulgated a code of laws called the Duke's Laws, which were the sole governing laws of the colony down to the meeting of the first Colonial Assembly, about the time the Dongan charter was given to Huntington.

The force and effect of the charter given by Charles the Second to the Duke of York, under which the first patent, that of 1666, was granted, has been adjudicated in the State Courts and in the Supreme Court of the United States. Without going into the question whether this charter was exclusively a grant of political power by the King for the sole purpose of organizing, carrying on and maintaining a government in America, or whether, in addition to this, it carried from the King to the Duke a private title in the soil (a question upon which authorities differ), we think it may be safely affirmed, and that without running counter to the decision in *Martin vs. Waddell* (16 Peter's U. S. R., 369), that after the Colonial Goverment had been organized and clothed with all the powers of a government, exec-

utive, judicial and legislative, the government of the Colony had power under the charter to grant title, in the name and in behalf of the King, to lands within the boundaries therein prescribed; and though, with respect to lands under tide waters, the Duke of York stood in the place of the King, holding them in trust for all the people, we claim that he might grant title therefor, and especially when his grant was ratified by the legislative power of the Colony, as we have seen was done in this case, thereby receiving the sanction of the whole political power controlling the particular subject, and competent to vest in the Town of Huntington a valid title to whatever lands, above or under water, came properly within the terms of the grants.

The people who held these titles at this early day did not intend they should be nullified, and at the very first regularly established Colonial Assembly in this Colony, which met 1691, the second act that was passed ratified these titles, and we have the authority of the New York Court of Appeals for saying that this act was a valid act.

See, especially, Brooklyn vs. Strong, 60 N. Y., 72, and 9 N. Y., 291.

It is of no special importance, we claim, that the word "bay" is not used in the grants to the town. These waters seem to have been called a harbor in early papers (see deed to Baldwin, in evidence). But haven is a more proper term as applied to these waters.

Sir Matthew Hale, in De Portibus Maris, written not far from the time these patents were given, defines a haven as follows:

"A haven is a place of large receipt and safe riding of ships so situated and secured by the land circumjacent that the vessels thereby ride and anchor safely and are protected from dangerous or violent winds, as Milford Haven, Plymouth Haven and the like, and there are some larger and some narrower. The smaller are

sometimes made, or, at least, helped, by art; the greater are made by nature."

The first patent, given by Governor Nicoll in 1666, was under authority of the charter to the Duke of York, and was strictly a grant of land conveying title within specified boundaries, as follows: "From a certain river, or creek, on the west, commonly called by the Indians by the name of Nackaquatck, and by the English the Cold Spring, to stretch Eastward to Nasaquake river; on the north to be bounded *by ye Sound, running betwixt Long Island and the Maine*, and on ye south by ye sea," &c., "with all havens, harbors, creeks, waters," &c.

In private grants by the King, arms of the sea are excluded, but in grants, which, in addition to conveying the soil, carry political powers, arms of the sea are included. *Angell on Tide Waters, page* 38, says: "But inasmuch as the King, by virtue of his prerogative, was authorized to create *political power* in this, as in all countries newly discovered and possessed by his subjects, the colonies, on receiving the royal charters, were invested with a *political character* by which they succeeded to the territorial interests which had previously belonged, as *jure regalia*, to the sovereign power of the parent country. These charters were in the nature of *grants*, and were conferred by the King on this idea, that he was proprietor. But as they respectively created governments, it is to be observed they were not construed as his other grants were; that is as not excluding arms of the sea, but as including them. And it was thus that the several colonies were invested with the sovereign authority, delegated by the Crown, to alter the common law in respect to their tide waters, or to grant an exclusive property therein at their discretion."

When the Duke of York, through his Governor, Nicoll, in 1666, granted to certain inhabitants of Huntington the territory before mentioned, and expressly declared therein that they, their heirs and assigns, shall

have " all the privileges of a town government within this government ; " he conferred on them political powers, and by using the same comprehensive terms that the charter contained, doubtless intended to make the grant as broad as the language indicates, and thus include " all havens, harbors, bays, creeks and rivers," &c., with " all fishing, hawking, hunting," &c., embracing *all arms of the sea* within the prescribed boundaries, As we have already seen, twenty-two years after the first patent, when the Duke of York had become King of England, he, as King, through his then Colonial Governor, Thomas Dongan, made a new grant confirming the former grant, at the same time granting other lands, and enlarging the powers of the Town Government. The water boundaries remained as in the former grant. This patent was approved by the Council of the Colony of New York, and was afterwards confirmed by the Colonial Assembly. It was a grant of soil, using the unmistakable words, " give, grant, bargain, sell, alienate."

It also carried with it political power commensurate with the purposes of a town government, taking it out of the rule that a private grant of soil to a subject is to be construed against the subject, and in favor of the King, and bringing it within that other rule that, where a grant carries political power, it shall be construed in favor of the grantee. If there is any reasonable doubt about the power of the Duke of York to grant title to the soil by virtue of this charter from Charles the Second, we submit that all difficulty is obviated upon this point by his having made this second grant through Governor Dongan after he, himself, had become King of England.

Seven years after the second grant was made, as appears in the preceding pages, a third patent was given by Governor Fletcher in the name of William and Mary, representing the Crown of England. This confirms all former grants, and changes the eastern boundaries, but does not affect its northern or southern

limits under tide waters. The language is, as to the northern boundary, "The sound that runs between our said Island of Nassau and the main Continent," while the "Sea" is designated as the southern boundary, including "all havens, harbors, creeks, coves, rivers," &c., and all "fishing, hunting," within the before-mentioned boundaries.

Possibly we may be aided somewhat in arriving at a proper construction of these patents by a reference to the principles of construction admitted by the English Courts.

In the King against the Bishop of Rochester and Sir Francis Clarke, Hilary Term (24 E., 25 Car. 2, Roll., 594,) HURDERS, Sargeant, laid down certain grounds or rules whereby to construe the King's Letters Patent among which we find "distinct words of relation in the King's grant are good to pass away anything."

In the King vs. Bishop of Chester: "Where a grant of the King may be taken to two intents, one good and the other not; it shall be construed to such intent as makes the grant good." "Where his intention appears to pass the thing, it shall pass" (4 Mod., p. 301).

It is not disputed that in a private grant of land, using the terms bounded by the shore of specific waters, or wholly silent as to the water, the grant only runs to high water mark; but we submit that it is a principle as old as the common law that waters within "known bounds" may be conveyed together with the dry land; that when they come within the body of the grant, as shown by appropriate words, they pass with the dry lands, especially when the grant, in addition to title, carries governing powers. We are at a loss to understand what more appropriate words the King could use for the purpose of granting havens, harbors, &c., than appears in the patents to this town. First, "the Sound" (not the shore of the Sound) is the northern boundary; next, the meadows, necks of lands, &c., together with all harbors, havens, &c., within the

before-mentioned bounds; that is, within the Sound. There was evidently an intent to pass all these waters. "When an intention appears to pass the thing, it shall pass." The fact that after the "Sound" was designated as the boundary, the instrument particularly enumerates the character of waters which shall be included in the grant, shows a purpose to leave no room for doubt or uncertainty as to the intent of the instruments; otherwise, the use of these phrases "havens, harbors," &c., are wholly meaningless.

The patent from Governor Dongan was submitted to the Attorney-General for examination and received his approval and the approval of the Council of the Colony, as appears upon its face. The charters and patents were evidently drawn with care by law officers, accustomed to prepare such documents, and it is fair to presume they used no more words, and no other terms, than were necessary and appropriate to effect the purpose designed.

The three patents given the Town of Huntington are very similar in their terms to other grants made by Colonial Governors under authority of Kings of England, during the same period, to other towns, and to individual proprietors. The law in this State is stated in the opinion of the Court of Appeals in Brookhaven vs. Strong *(supra)*, as follows:

"The rule is that, when a patent or grant conveys a tract of land by metes and bounds, the land under water, as well as other land, will pass if the land under water lies within the bounds of the grant, and as we have said, the title of land under water confers the right of a several fishery."

## POINT II.

**The patents convey a good title to the lands under these waters, subject to a full and free right of navigation. The Courts of the State of New York have so held.**

Rogers vs. Jones, 1 Wend., 238.
Brookhaven vs. Strong, 60 N. Y., 72.
Robins vs. Ackerly, 91 N. Y., 98.
Newton vs. Hand, 92 N. Y., 98.
The Town of North Hempstead vs. Thompson, 8 N. Y. S. Rep., 901 ; affirmed, 115 N. Y., 635.
The Trustees of the Freeholders and Commonalty of the Town of Southampton vs. The Macox Bay Oyster Co., 116 N. Y., 1.

There has been a uniform holding by the Courts of this State to this doctrine, with one exception, to wit, the case of Lowndes vs. Dickerson, 34 Barb., 586, which has been expressly overruled in 60 N. Y. and 91 N. Y., *Id.*

That was an action against a citizen of the town who attempted to justify, under these grants, the taking of the plaintiff's planted oysters. The decision was correct, but rendered on a wrong ground by the Court.

The case of Rogers vs. Jones was decided years ago ; it arose concerning trespass in Oyster Bay, the waters next West of Lloyd's Neck, similarly situated to those of Huntington Bay.

The courts of New York do not base their decisions expressly on the grants to the Duke of York. We have introduced these patents in evidence, but we do not consider them essential ; but said courts base their decisions on the patents themselves to the towns, which were ratified by the Colonial Legislature, and, later, by the several Constitutions of the State of New York.

# COLONIAL LAWS, N. Y.

## (Act of May 6, 1691.)

### Chap. II.

An Act for Settling, Quieting and Confirming unto the Cities, Towns, Manors, and Freeholders within this Province their several Grants Patents and Rights respectively.

Pass'd the 6th day of May 1691.

Forasmuch as the many changes, Alterations and Disturbances, that have been lately given unto Their Majesties Subjects inhabiting within this Their Province, hath and doth very much discourage the Settling, Improving, and the Growth and Strength thereof; and that it is now absolutely necessary, for the quieting and satisfying Their Majesties good Subjects within the same, that the Rights and Privileges formerly held by, and granted to the respective Cities, Towns, Manors, and Freeholders within this Province, &c. should be now ratified and confirmed:

I. Be it therefore Enacted by the Governor, Council, and Repsentatives convened in General Assembly, and it is hereby Enacted and Declared by the Authority of the same, That all the Charters, Patents and Grants, made given, and granted, and well and truly executed under the Seal of this Province, constituted and authorized by their late and present Majesties, the Kings of England, and registered in the Secretary's Office, unto the several and respective Corporations or Bodies Politick of the Cities, Towns, and Manors, and also to the several and respective freeholders within this Province, are and shall forever be deemed, esteemed, and reputed good and effectual Charters, Patents, and Grants authentick in the Law, against their Majesties, Their Heirs, and Successors, forever,

notwithstanding of the Want of Form in the Law, or the Nonfeizance of any Right, Privilege, or Custom, which ought to have been done heretofore by the Constitutions and Directions contain'd in the respective Charters, Patents and Grants aforesaid.

II. And be it further Enacted by the Authority aforesaid, That all the Charters, Patents, and Grants made, given, and granted, as aforesaid unto all and every the several and respective Corporations or Bodies Politick of the Cities, Towns, and Manors, and their successors, and also unto all and every the respective Freeholders, their Heirs and Assignes, forever, within this Province, are, to all Intents and Purposes whatsoever, hereby ratified and confirmed, to have, hold, exercise, occupy, possess, and enjoy all their and every of their former Rights, Customs, Prerogatives, Privileges, Preheminencies, Practices, Immunities Liberties, Franchises, Royalties, and Usages whatsoever, in as full and ample Manner as if none of these Changes, Alterations Disturbances, Want of other Forms in the Law, or the Non-feizance of any Rights Privileges, or Customs of any of the Corporations aforesaid, had never happened, or been neglected; any Thing herein contained, or in any other Law to the contrary in any wise notwithstanding Provided, That nothing herein contained shall be construed or taken, to bar any Person or Persons, of his or their former and just Right or Pretences, to any House, Tract, or Parcel of Land within this Province: Always provided, That he or they that have any such just Right or Pretence, do make his or their Claim within the Space of Five Years next after the date hereof.

And also provided, That nothing herein contained shall be intended or construed to the Prejudice or Hindrance of the Title or Claim of any Person under age, *Feme Covert*, *Non Compos Mentis*, Imprisonment, or beyond the Seas. (See Livingston & Smith's Colonial Laws, printed 1752, p. 2 & 3.)

Section XXXVI. of the first Constitution of the State of New York reads as follows: "And be it further ordained: That all grants of land within this State, made by the King of Great Britain, or persons acting under his authority, after the fourteenth day of October, 1775, shall be null and void; but that nothing in this Constitution contained shall be construed to affect any grants of land, within this State, made by the authority of the said King, or his predecessors, or to annul any charters to bodies politic by him, or them, or any of them, made prior to that date. And that none of the said charters shall be adjudged to be void by reason of any nonuser or misuser of any of their respective rights or privileges, between the 9th day of April, 1775, and the publication of this constitution. And, further, that all such of the officers described in the said charters respectively as, by the terms of the said charters, were to be appointed by the Governor of the Colony of New York, with or without the advice of the said King, in the said colony, shall henceforth be appointed by the council established by this constitution for the appointment of officers in this State, until otherwise directed by the Legislature."

By Section 14 of Article 7 of the second Constitution of the State, adopted in 1821, this is made to read as follows:

"All grants of lands within this State made by the King of Great Britain, or persons acting under his authority, after the 4th day of October, 1775, shall be null and void; but, nothing contained in this constitution shall affect any grants of land within this State made by the authority of the said King or his predecessors, or shall annul any charters to bodies politic and corporate, by him or them made before that day; or shall affect any such grants or charters since made by this State, or by persons acting under its authority, or shall affect the obligation of any debts contracted by the State or individuals, or bodies corporate, or any

other right of property, or any suits, actions, rights of action, or other proceedings in courts of justice."

This is repeated by Section 18 of Article I., Constitution adopted in 1846 and now in force.

In the case of the People against Von Rensselaer and others, 9 N. Y., 291, it was held that royal letters patent granting lands in the Province of New York were not void by reason of their conferring manorial privileges and franchises upon the patentees.

It was further held that such letters patent, issued in 1685, even if void for that reason, were confirmed and made valid by the Colonial Act of May, 1691.

In this case the Attorney-General of the State appeared and made an elaborate argument that the patent was void (see pp. 313 to 318 of Case). DENIO, Judge, commencing at page 346 and continuing to 349, discusses the question of the effect of the Act of May, 1691: "I am of opinion, also, that the Colonial Act of May, 1691, which was approved by the Crown, would protect the appellant against this action if there was nothing else in the case, etc., etc.," and concludes at the bottom of page 348: "If, therefore, this patent was void for the reasons which have been argued, it was ratified and confirmed by this act of the Colonial Legislature, and cannot now be impeached."

This case was decided in 1853, and the whole Court concurred.

In Furman *et al.* against the Mayor, etc., of the City of New York, 10 N. Y., 567, head note: "The corporation of the City of New York, by virtue of its ancient charters, confirmed by the Constitution of the State, is the owner in fee of the land under water along the East and North Rivers, to the extent of 400 feet beyond the line of low-water mark, at the time when its charters were granted."

These charters were granted by the Colonial Governors.

In Fowler vs. Remson *et al.*, 70 N. Y., at page 308, Judge MILLER, delivering the opinion of the Court,

says: "The portion between high and low water mark, known as the tide way, was granted to the city by the early charters (Dongan Charters 3 and 14; Montgomerie Charter 37), and the corporation own an absolute fee in the same."

In Langdon vs. Mayor, etc., of City of New York, 93 N. Y., 134, EARL, J., delivering the opinion of the Court, says: "Under the Dongan Charter, in 1686, the Crown of England granted to the City of New York all the land between high and low-water mark around the Island of Manhattan, with jurisdiction over the same, and with power to take in, fill and make up and lay out all and singular the lands and grounds in and about said City and Island of Manhattan, and the same to build upon or make use of in any other manner or way as to them shall seem fit as far into the rivers thereof and that compose the same as low-water mark aforesaid. And in 1730, by the Montgomerie Charter, it further granted a strip of land 400 feet in width, lying immediately outside of low-water mark, and extending from Corlear's Hook on the East River around the southern extremity of the island to Bestovers rivulet (excepting, however, the shore in front of the battery) with full power and authority at any time thereafter to fill, make up wharf, and lay out all and every part thereof, and to take the wharfage, cranage and dockage arising or accruing therefrom."

In Mayor, etc., of City of New York vs. Hart *et al.* (95 N. Y., 443), FRICK, J., delivering opinion of Court at page 450, says: "That the City of New York by the terms of the Dongon Charter, granted in 1686, acquired the title to the tideway or land between high and low watermark, on the whole circuit of Manhattan Island, and held it as an absolute fee, has been decided by this Court (Furman vs. Mayor, etc., 6 Seld., 567; Fowler vs. Remson, 70 N. Y., 303; Langdon vs. Mayor, etc., 93 N. Y., 134.)"

In the case cited in 91 N. Y. the particular patents in

this case were in issue. In 1 Wend., 60 N. Y., 92 N. Y., 116 N. Y. and 115 N. Y., cited, the issue was on patents almost identical in language with those at bar. The other authorities cited in reference to the lands around the City of New York are identical in principle and show the vast property interest involved under these patents.

The case of Martin vs. Woddell (16 Pet. U. S., 367) was not decided on the points involved here. Chief-Justice CHURCH in 60 N. Y., at page 66, clearly defines this fact. But that case, even if it did, is distinguishable from the case at bar in its essential facts on which the judgment of our Courts have been based, to wit: ratification by the Colonial Legislature and by the Constitution, and long claim and holding under the grants.

The case of the Illinois C. R. R. Co. vs. State of Ill., Supreme Court Reporter, Vol. 18, page 110, does not control these patents, for these reasons, to wit: Assuming for the purpose of this argument that the power and control over the lands under water conferred upon the town by its patents can be revoked by the Legislature, yet, until the State exercises such power of revocation, the delegated control is in the town, and can be exercised by it. Such power of revocation had been exercised by the Legislature of Illinois in the case cited; in the case of the State of New York such power of revocation had been exercised by the Legislative Assembly of the Colony of New York, in 1691, in regard to certain charters, some being annulled and others confirmed (see 60 N. Y. cited p. 68), and this Colonial statute was continued in force by the Constitution of the State, as we hereinafter show by citation from the Constitution. A suit in ejectment against a non-resident who seeks to appropriate such lands under water to his own exclusive use is an appropiate exercise of such delegated power, and that is this suit.

But these rights of the State pertaining to its navigable waters may be irrevocably surrendered, so far as

the Legislature is concerned, the question in this regard being only how and to whom.

It was said in Martin vs. Waddell cited: "When the Revolution took place the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters, and the soil under them, for their own common use, subject only to the rights since surrendered by the Constitution to the General Government."

The right to regulate commerce and navigation was delegated to the United States.

Now the People, acting in constitutional convention, may then surrender such rights to the General Government; so they may also to a county or town over the waters within the limits of such county or town, and such surrender is valid.

*(a)* Because there is no limit to the power of the People acting in constitutional convention, and they thus may grant (or authorize the grant of) lands under water even to a private individual with all rights pertaining thereto (not theretofore surrendered to the General Government).

These patents having been ratified by the subsequent Constitutions of the State of New York, also the Act of the Colonial Legislature having been ratified and continued in force by the Constitution, they have the same force and effect as if made directly by the People in constitutional convention assembled.

*(b)* The grantee being a municipal body, a town, the surrender of the control over the lands under water within its limits is consistent with its holding them in trust and in furtherance thereof (see the Dongan Patent, pp. 16 and 17 of the Transcript). It creates a town, and the grant is to trustees thereof, and the nature and character of the trust is specified. It certainly vests control of the premises described therein in such trustees as against a non-resident of the State.

Again, it has been the rule of the United States Su-

preme Court in cases involving the question of title to lands wholly within a State, to follow the decisions of the highest Court of the State when those decisions have been uniform.

In Gage vs. Pumpelly (115 U. S., 454) it was held that where decisions of the highest Courts of the State establish a rule of property they will, as a rule, be followed by this Court.

In Bondurant vs. Watson (103 U. S., 281) it was held that decisions establishing a rule of real property in a State are binding on this Court. Justice WOODS says at page 544: "The decisions above cited, establishing, as they do, a rule of real property in the State of Louisiana, are binding on this Court and are conclusive of this case (Suydam vs. Williamson, 24 How., 427; Jackson vs. Cohen, 12 Wheat., 162; Beauregard vs. New Orleans, 18 How., 497)."

The decisions of the highest Courts of New York have been uniform as to the construction of the Colonial Act of Legislature confirming these grants and as to the construction of the Constitution, and consequently should be binding on the United States Courts.

Elmwood vs. Marcy, 92 U. S., 289.
Indianapolis & St. L. R. R. Co. vs. Vance, 96 U. S., 480.

## POINT III.

### The Colonial grants vest in the trustees of the town an exclusive oyster fishery.

It is admitted that, by the common law, as long as the soil under tide waters is held by the King, or by the State, it is so held subject to the right of the people of the Kingdom, or the State, as the case may be, to fish in the waters that flow over it. Lord HALE says:

"The King is lord of the great waste of the sea, subject to certain beneficial rights of fishing and navigation, immemorially enjoyed by his subjects therein by the custom of the realm, which is the common law." The reason of the law seems to be discovered in the fact that the deep and remote sea is incapable of being utilized and reduced to individual possession: nevertheless, as is held by BRACTON, those parts of the sea lying near the shore may be capable of individual improvement, occupation and profit; and, as to such parts, the reason of the rule ceases and the law ceases.

In an old English case, reported 1 Mod., 21 Charles, page 106, the common-law rule is plainly stated as follows: "In case of a navigable river, the lord having the soil, it is good evidence to prove that he hath the right of fishing, and it puts the proof upon them that claim *liberam piscarium*. But, in case of a river that flows and reflows, and is an arm of the sea, then *prima facie* it is common to all; and, if any will appropriate a privilege to himself, the proof lieth on his side; for, in case of an action of trespass brought for fishing there, it is *prima facie* a good justification to say that the *locus in quo is brachium maris unusqui doni regis habet et habere debet liberum piscarium*. In the Rivern Severn there are particular restraints, but the soil doth belong to the lords on either side, snd a special sort of fishery belongs to them likewise, but the common sort of fishery is common to all. The soil of the River Thames is in the King, and the Lord Mayor is conservator of the river, and it is common to all fishermen; therefore, there is no such contradiction betwixt the soil being in one and yet the river being common to all fisheries. These authorities, however, only go to show that a common right of fishing existed while the sovereignty held the soil and waters free from grant.

To the claim of any citizen of the State of New York to fish in the waters within the grants to the Town of Huntington, upon the ground of having a common

right of fishery, the town would have to interpose the plea of a special, exclusive fishery, and bring into court the badges of such right, viz.: The charters and grants under which it claims, and which it now does.

The three several patents of the town, in express words, convey to the town "all fishing, hawking, hunting," &c., within the boundaries prescribed. That the intent was to convey to the town an exclusive fishery, we think there can be no reasonable doubt. If it be contended that nothing more was intended to be conveyed than the right of a common fishery, the answer is that no words whatever were necessary to convey a common fishery. A common fishery in all the seas, and arms of the sea, where an exclusive one was not lawfully held, was the common birthright of every Englishman. It would, therefore, have been.
an idle mockery for the sovereign, in the solemn form of a grant, to seek to convey to the people what they already held without a grant. If the words "all fishing," &c., are construed as conveying a common fishery, the grant is, in that respect, void.

"Although a several fishery in an arm of the sea may be prescribed for, and may pass as a privilege appurtenant to an estate, yet a prescription for a common fishery therein, as appurtenant to an estate, is bad. Thus, in *Ward vs. Creswell* (Willis' R., 265), the Court held that, as all the subjects of England might of common right fish in the sea, &c., a prescription for it, as appurtenant to a particular township, was void, and as absurd as a prescription would be for traveling the King's highway as appurtenant to a particular estate" *(Angell on Tide Waters, p.* 274*)*.

"Where a grant of the King may be taken to two intents, one good and the other not, it should be construed to such intent as makes the grant good" *(King vs. Bishop of Chester,* 4 *Mod., p.* 301*)*.

A grant or prescription of a common fishery being bad, we should construe the words "all fishing," &c., in the grant under consideration, as conveying an *exclusive*

fishery, that being " such an intent as makes the grant good " under the rule above quoted.

This brings us to the question whether, although the King intended to convey an exclusive fishery, he really had power to do so. For, however ready he may have been to grant an exclusive fishery to the people of the Town of Huntington, and however clear and appropriate the terms employed in the instrument, for that purpose, if there were no power to do the thing sought to be done, the grants are, in that respect, of no avail.

The question whether the King alone, since *Magna Charta*, can grant an exclusive fishery, has greatly occupied the attention of lawyers and the Courts for the last four hundred years. On the part of those who deny the right, it is claimed that, although formerly the King alone had the right, yet by the sixteenth section of *Magna Charta*, passed in the ninth year of Henry the Third, the King was debarred of that right, and that ever since no exclusive or several fisheries have been granted, other than by Act of Parliament; or, if such have been granted, they are void. On the other hand, it is claimed that *Magna Charta* only restrained the King from putting the public fisheries " in defense " for his own exclusive use and enjoyment, as had been heretofore done as to the royal fisheries of the River Banne, but did not restrain him from granting exclusive fisheries to his subjects, as he had hitherto been accustomed to do. The authorities cited to sustain this construction are: 2 *Black. Com.*, 39; *Cruise's Digest*, 261, *title Franchise; Duke of Somersett vs. Fogwell*, 2 *Barn. & Cress*, 875; 1 *Statutes Great Britain and Ireland*, 579, 718; 2 *Ib.*, 213, 242, 644, 688; 7 *Coke's Rep., part* 13, *pp.* 35, 36. It is also claimed that if the construction above stated was ever placed on the sixteenth section of *Magna Charta* it had in such sense, long before the grants under which Huntington claims were made, become *obsolete*, and that the King continued afterwards to make such grants without an Act of Parliament, and that such grants were

upheld. Another answer is that *Magna Charta* is a mere statute, and its application was local and confined to the realm of England, for which the Parliament which passed it was the local Legislature, unless subsequently expressly extended to the colonies by competent authority.

Much reliance has been placed on the old English case of *Warren vs. Mathews* (as reported in 6 Mod., 73), where it is said: "Every subject of common right may fish with lawful nets," &c., "in navigable rivers as well as in the sea, and the King's grant cannot bar them thereof." On the other hand it is claimed, on high authority, that this report of the case is a *mistake;* that the Court intended to speak only of the right of the case in hand; that the King's grant, *in that case*, did not, or could not, bar the subject, because it was a *defective* grant; or that, for other reasons than a want of power in the King to grant an exclusive fishery, the grant under consideration did not bar the right of common fishery. This is said to be the only case to be found in which the broad proposition is stated that the King's grant cannot bar the subject of the common right of fishery. Afterwards, the King's Bench, in the case of *Carter vs. Murcott* (4 Burr. R., 2162), did not recognize the doctrine of *Warren vs. Mathews*, above referred to. Justice YATES, in Davis' report, says: "It is agreeable to the law that the Crown may grant a several fishery in navigable rivers, where the sea flows and reflows, and in an arm of the sea."

The King has made grants of several and exclusive fisheries since *Magna Charta*, and these grants have been sustained and may be sustained, in proof of which we refer to Darr. Rep., 155; Donegal vs. Hamilton, 3; 3 Ridgway's Parliamentary Ccases, 276, 328; 5 Cruise's Digest, 45, Sec. 10, Tit. 54, King's Grant; Carter vs. Murcott, 4 Burr. Rep., 2163; 1 Mod. Rep., 105; Com. Dig., 108, Tit. Navigation; 4 Coke Rep., Pt. 7, p. 19; Balbrooke vs. Gooden, 2 Burr., 1768; The Bankers Case, Skinner's Rep., 601; The Mayor of Oxford vs.

Richardson, 4 Dunford and East., 436; 5 Burr. 285; 5 Mod., 556; 3 Barn. and Cross, 875.

Among the American cases which sustain the right of the King to make such grants we cite the following: 2 Binney's Rep., 476; 4 Mass. Rep., 144, 522; 1 Pick., 180; 3 Johns. Rep., 357; 6 Johns., 131; 17 Johns., 195; 20 Johns., 90; 1 Conn. R., 284; 7 Conn. Rep., 486; 2 Conn. Rep., 481; 1 Har. & McHen., 564; 8 Wheat., 577, 597. Justice THOMPSON, of the United States Supreme Court, in the case of Martin vs. Waddell, says: "The doctrine as laid down in the case of Carter vs. Murcott is universally recognized as the settled law on the subject, and is fully adopted and sanctioned by the Courts of this country. Numerous cases of this description have come before the Courts of the State of New York, and the principles and rules as laid down in the case of Carter vs. Murcott are fully recognized and adopted."

In the case of James and Gould, 6 Cowen, 376, the Court in referring to that case place the decision upon it and say: "This is the acknowledged law of Great Britain and of this State, and cases are referred to showing such to be the settled law."

Though the question is involved in some difficulty, we believe that the weight of authority is on the side that the King may, since Magna Charta, grant an exclusive fishery in the realm of England. Yet, if there were doubts as to the power of the King to make such grants within the realm, we think that all reasonable room for doubt upon the subject disappears with respect to his power to grant an exclusive fishery in the old colony of New York. We submit that Long Island and its waters never formed any part of the realm of England, upon which the pretended prohibition of Magna Charta could operate, unless its provisions were expressly extended and applied to the colony. Charles the Second, by his charter to the Duke of York, pursuant to the inherent power in the sovereign to establish and maintain order, and the rights of property among

his subjects in distant colonies, made a grant of political power, under which the colony could, and did, organize a local law-making body of their own, competent to make laws for the government of the colony, as Parliament made laws for the realm of England. If a ratifying act of Parliament was essential to give validity to a grant by the King of an exclusive fishery within the realm, the Legislature of the colony of New York could, pursuant to its powers, lend the like sanction and force to a grant within the territories of such colony. The colonists always claimed such power and authority over their own local concerns, and denied such authority in Parliament.

Under the powers of government conferred through the charter, the people of the colony could, in their discretion, change the common law of England upon the subject of the common right of fishery in the same manner that they changed it upon other subjects. The people of the Town of Huntington always claimed the power, under their respective charters and grants, to an exclusive fishery within the limits of their grant. Long after they had claimed and exercised these rights, through orders made at town meetings and otherwise, and ratified by the Colonial Assembly of the colony in 1691, as hereinbefore set forth, independent of the foregoing act of the Colonial Assembly, the immemorial custom of the people of the Town of Huntington, and all the seacoast towns of the Colony of New York, in maintaining an exclusive fishery within their waters, is one of the customs thus sanctioned, no matter how repugnant it may have been to the common law or public right of fishery in England, if, indeed, it was repugnant, which is extremely doubtful.

The principle that the colonies might change the common law of England in respect to rights of this nature has never been denied. Under the old common law riparian owners own or hold title to the line of high water mark only, having certain riparian rights only, and such is the law in this State. In Massachusetts, a

Colonial Legislature enacted that owners adjoining tide waters should own to low water mark. Thus the common law was abrogated in that State, and a new rule established, which has been maintained to this day. The same was the case in Connecticut and other States. The Supreme Court of the United States, in the case of Cornfield vs. Coryell, 4 Wash. Cir. Co. R., 384, fully recognized this principle, and applied it to the case of the boundaries of New Jersey. The Court said: "The only objection which could have been opposed to the exercise of those acts of ownership under this grant, was that the Duke had himself no title to the Bay and River Delaware, under the royal grant to him. But the presumption is, nevertheless, irresistible, that the benefits intended to be bestowed by this grant, *and which were confirmed by the other Acts of the Provincial Government*, before noticed, were considered by the inhabitants of the Province as being too valuable not to be enjoyed by them. This use of the bay and river amounted to an appropriation of the water so used, and this title became, as has before been observed, indefeasable by the treaty of peace," &c.

We submit that when, therefore, the Town of Huntington brings into Court its several charters and patents from the Kings of England, sanctioned and confirmed by the Colonial Council, and the Colonial Assembly, its titles and rights are invested with the badges of all the appropriate political powers, executive and legislative, within or without the colony, and the rights thus acquired became indefeasable by the treaty of peace with Great Britain and the constitution and laws of the State of New York.

Justice THOMPSON, of the United States Supreme Court, very clearly states this distinction in his opinion in the case of *Martin vs. Waddell.* Though a dissenting opinion, his views upon this particular point do not appear to be in conflict with the opinion of the Court in that case. He says: "With respect, however, to the right of fishery, there is, in my judgment, a marked

distinction, both in reason and authority, between the right in relation to floating fish and the right of dredging for oysters. The latter is entirely local and connected with the soil. There are natural beds of oysters; but in other places there is a peculiar soil adapted to the growing of oysters. They are planted and cultivated by the hand of man like other productions of the earth; and the books in many cases clearly hold up a distinction and speak of the oyster fishing as distinct from that of floating fish (5 Burr., 2814); and in the case of Rogers and others vs. Allen (Camp. Rep., 309), this distinction is expressly taken. It was an action of trespass for breaking and entering the several oyster fishery of the plaintiff in Burnham River, and fishing and dredging for oysters. The defense set up was that the *locus in quo* was a navigable river in which all the King's subjects had a right to fish and dredge for oysters, and evidence was introduced showing that all who chose had been accustomed to fish in Burnham River for all sorts of floating fish, without interruption; and it was contended that a fishery was entire, and that as it had been proved that it was lawful for all the King's subjects to catch floating fish, so they might lawfully dredge for oysters. But HEATH, Justice, ruled otherwise, and said: "A fishery was divisible, a part may be abandoned, and another part of more value may be preserved. The public may be entitled to catch floating fish in the River Burnham, but it by no means follows that they are justified in dredging for oysters, which may still remain private property; and, although a new trial was granted upon another point in the case, the doctrine as above stated was not at all impugned by the Court of King's Bench."

Whatever may have been, or may be, the power of the King as to granting an exclusive or several fishery in the tide waters within the realm of England, we think we may safely conclude that by virtue of the Charter from Charles the Second to the Duke of York in 1663, and the three several patents or grants to the

town, dated respectively 1666, 1688 and 1694, ratified by Act of the Colonial Legislature and by the Constitution of the State of New York, strengthened by immemorial custom, a valid title is vested in the Town of Huntington to the lands covered by the tide waters of its bays, harbors, creeks and coves, and the shores thereof, and that it has an exclusive fishery in all such waters.

This we submit is the doctrine of the Court of Appeals in this State.

"A grant of the soil with the right of a several fishery, in an arm of the sea by a Colonial Governor, ratified and confirmed by Act of a Colonial Assembly, conveyed an exclusive right to the oyster fisheries in the waters covered by the grant" (Brookhaven vs. Strong, 60 N. Y., *supra*). "The Patent to the inhabitants of Oyster Bay conveyed all the lands under water within the bounds of that grant, together with the exclusive right of fishery in the waters within the same." "Such right is the common property of the town and may be regulated by rules adopted in town meetings" (Rogers vs. Jones, 1 Wend., *supra*).

The case of the People of the State of New York vs. Stanley H. Lowndes, 130 N. Y., 455, was a criminal prosecution under Section 441 of the Penal Code of this State against non-residents gathering or planting oysters in the waters of this State, already quoted. The premises where the oysters were planted were in Huntington Bay, near the premises involved in this case. The prosecution was in behalf of the Town of Huntington, claiming the premises against a citizen of the State of Connecticut. The conviction of the defendant by a lower Court was reversed by the Court of Appeals of this State on purely technical grounds a defect in the words of the indictment; but the Court, without expressing any opinion as to whether the premises were within the colonial grants or not, said, page 461:

"If the *locus in quo* was not within the colonial

patents or grants, it was the property of the State, and passed to the Trustees of the Town of Huntington by the legislative act of cession of May, preceding the time of the alleged offense" (Laws of 1888, Ch. 249), and, further on (p. 462):

"The statute (Penal Code, Sec. 441) was passed with the view to discriminate between those persons who were and those who were not residents of the State, and in favor of the former to the exclusion of the latter, for the purpose of planting oysters and gathering oysters in its waters. This, to that extent, is a lawful exercise of legislative power over the common property of the citizens of the State."

McCrardy vs. Virginia, 94 U. S., 391.

The same may be said of the ceding act to the Town of Huntington. It is evident that, in passing that act, the Legislature intended to exclude non-residents of the State from the use of shell-fishing in this bay.

The same construction must be put upon the patents to the town. Whatever difference of opinion there may be as to the construction to be put upon them in other respects, it is evident that non-residents were intended to be excluded from the use of the shell fisheries in the waters included within them.

## POINT IV.

**The plaintiff in error has failed to show any right to continue to use these lands by adverse possession or by reason of any easement claimed to be gained therein.**

The present statute of New York State on the question of adverse possession reads:

Code of Civil Procedure provides:

"§ 368. Possession, when presumed; occupation presumed to be under legal title.

"In an action to recover real property, or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof, within the time required by law; and the occupation of the premises by another person is deemed to have been under and in subordination to the legal title, unless the premises have been held and possessed adversely to the legal title for twenty years before the commencement of the action."

§§ 669 and 370 relate to adverse possession under a written instrument or judgment.

"§ 371. Adverse possession under a claim of title not written.

"Where there has been an actual continual occupation of premises under a claim of title exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely."

This is substantially as it has been for a great many years. No pretense is made of any claim under any paper title or by judgment or decree.

The following is the appellant's own statement of his claim on the witness stand: "I took these lands and occupied them—examined them—as I understood I had a right to do if I didn't find a natural growth of oysters there; that is the claim under which I went there and planted oysters, that there was no natural growth oysters there" (see p. 88 of Transcript), and on page 89 he says, "When I commenced to plant oysters on these grounds I claimed that the bottoms were owned by the State. I do yet. I don't claim to own the ground at all."

And we proved that after the Act of 1887 he applied to the Fish Commissioners for a lease of this very land, and was refused (see pp. 88 and 89 of Record).

The words of the statute are: "under a claim of title, exclusive of any other right."

His own evidence shows he makes no claim of title; he merely claims a license to plant oysters there. As a matter of law and fact, such lands are not capable of being held adversely.

In order to establish title by adverse possession, the party in possession must be in there under a claim of title in himself as against all the world.

In Odgen vs. Jennings, 46 Barb., page 308, the Court says: "To make the defense of adverse possession, it must be accompanied with a claim of title exclusive of the rights of all others, and must be definite, notorious and continued," etc.

In Colvin vs. Burnett, 17 Wend., 564, the Court says: "A single lisp of acknowledgment by the defendant that he claims no title, fastens a character upon his possession which makes it unavailable for ages."

In Howard vs. Howard, 17 Barb., 663, the Court says (Head note): "To constitute a possession adverse to the true owner, there must be a claim of title, and the claim must be of the entire title. It must be such as necessarily to exclude the idea of title in any other person."

At page 667 the Court also says: "When a plaintiff has shown title, and the defendant relies on possession, and the *quo animo* it was commenced and continued, are the only tests, and it must necessarily be exclusive of any other right. This doctrine has often been repeated.

What is meant by the *quo animo?* Is it an intent to take possession of another man's land, knowing it to be such, and make it his own by twenty years' possession? This will not be pretended. Such an entry would be a mere trespass, and the person so trespassing with no other pretense or color of title will always be a trespasser. The *animo*, then, or the intent with which the entry is made, must be *bona fide* an entry,

believing in good faith that the land is his and he has the title."

Livingston vs. The Penn. Iron Co., 9 Wend., 511: If it appears that the title claimed is subservient to, and admits the existence of, a higher title, the possession is not adverse.

Smith vs. Burtis, 9 John., 180.
Jackson vs. Johnson, 5 Cowen, 74.
Hoyt vs. Dillon, 19 Barb., 651.

In Robinson vs. Kiner, 70 N. Y., 152, the Court says: "To constitute an adverse possession, from which a grant will be presumed, it must have been under the claim of title, exclusive of any other right."

It is well-settled law that the possession is presumed to be in the person who shows title by grant, writing or deed, unless there is an actual adverse possession, as defined by the Courts.

In Bliss vs. Johnson, 64 N. Y., 235, the Court, at page 242, says: "The settled principles of law requires the courts to consider the true owner as constructively in possession of the land to which he holds title, unless it is in the actual hostile occupation of another under a claim of title, and this rule is still more imperative in the case of wild and cultivated tracts of land which are not legally susceptible of actual occupation.

Doe vs. Thompson, 5 Cowen, 371.
Thomson vs. Burhaus, 79 N. Y., 99 (affirming 9 Hun, 1.
Higenbotham vs. Stoddart, 72 N. Y., 94.

Theodore S. Lowndes acquired no easement in the premises by his occupation.

An easement can only be obtained by the same evidence of adverse possession as would be necessary to establish a title to the land; that an easement by prescription can only be gained by use, notorious, visible,

uninterrupted and undisputed, and under claim of right adverse to the true owner.

Ward vs. Warren, 82 N. Y., 265.
Nichols vs. Wentworth, 100 N. Y., 455.

The claim of right here referred to must be like the claim of title; to wit, against any owner. Admitting that the State owns the land and claiming a right because the State so owns it instead of the town, is not such a claim of right as the law requires to prescribe an easement.

Planting oysters is not open and notorious. It is like the case of a drain laid under the land of another who knows nothing about it.

Munson vs. Reid, 46 Hun, 399.

In such a case the defendant must show that the plaintiff, or the owner of the dominant estate, had express notice of the user. The right to plant oysters is not such a right as is susceptible of becoming an easement. Oysters are something that grow upon the bottom; they do not shift about; they cannot be interfered with while growing; no other use whatever can be made of the land without interfering with and injuring the oysters; hence it necessarily excludes all other uses of the land whatever, and virtually amounts to a claim in fee. Such a right must be exercised by virtue of absolute ownership, or authority from the owner, and if the party fails in his title, he must fail in the right of using the soil for the purposes of oyster planting. No one will acquire a title by prescription by pasturing his cattle on an open common or highway. These being kept open for public uses, no one by using them can raise any presumption of a particular grant in his favor.

Thomas vs. Marsfield, 13 Pick., 240.
Kellogg vs. Thomson, 66 N. Y., 88.
65 N. Y., 57.

See, also,

125 Mass., 253.
2 Pick., 60.

A tolerated or impressive user will not mature into a title by prescription.

Dodge vs. McClintock, 47 N. H., 387.
Polly vs. McCall, 37 Ala., 20.
Pierce vs. Cloud, 43 Penn., 113.
Slater vs. Jepherson, 6 Cush., 129.
Stephens vs. Hollister, 18 Vermont, 29.
Parker vs. Parker, 1 Allen, 245.
Stevens vs. Taft, 11 Gray, 35.
Morrison vs. Chapin, 97 Mass., 76.
Morris vs. Callahan, 105 Mass., 133.
Colvin vs. Hollis, 3 Met., 128.

Entering upon land adjoining a pond and cutting thatch there growing between high and low water every year for twenty years, or digging sand occasionally upon land, or cutting timber upon wild lands, are mere acts of trespass, and do not constitute a disseisin.

Wheeler vs. Spinola, 54 N. Y., 387.
Roberts vs. Baungarten, 51 N. Y. Superior Ct., 482.
Parker vs. Wallis, 60 Maryl., 15.
Townsend vs. Rieves, 44 N. J. L., 525.

Where the act of supposed disseisin is equivocal in its nature, the presumption always is that it is in accordance with, and not hostile to, the title of the true owner.

Wash. Real Prop., Vol. 3, p. 170.

As to the definition of "easement" see Pierce vs. Keator, 70 N. Y., 420.

Prescription only raises a legal presumption of title, which may be rebutted by other evidence.

16 Wend., 531; Best on Presumptions, p. 103.
Campbell vs. Wilson, 3 East, 294.

We refer the learned Court to page 48 of our brief, showing that the appellant continued to plant oysters on these lands without any right and against the law after he had become a non-resident of the State, and

therefore, the law is applicable here: as laid down in Burbank vs. Fay, 65 N. Y., 57, that the whole theory of prescription depends upon a supposed grant. No such grant can be presumed where a grant would be unlawful or contrary to law. At page 67 many cases are cited to uphold this doctrine. This case is cited with approval (116 N. Y., at p. 388).

## POINT V.

**Title was conveyed under the ceding act of the State which is as follows:**

Chapter 297, L. 1888:

"An Act to cede lands under water of Huntington Bay, Town of Huntington, Suffolk County, Long Island, to the Trustees of the Town of Huntington, and their successors in office, for the cultivation of shellfish.

"Became a law without the approval of the Governor, in accordance with the provisions of article four, section nine of the Constitution, May, 10, 1888. Passed by a two-thirds vote.

"The people of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. All the right, title and interest which the people of the State of New York have, if any, in and to the lands outside of and beyond low-water mark under the waters of Huntington Bay, in the Town of Huntington, Suffolk County, southerly of a line drawn from a granite monument now set near high-water mark on the northerly point of Eaton's Neck, and west of the United States Life Saving Station, to a locust monument set on Lloyd's Neck, which line runs on a course south fifty-nine degrees twenty minutes and twenty-five seconds west, and which

is the line claimed by the Trustees of the Town of Huntington as the northerly line of their grants under Colonial patents, is hereby ceded to the present Trustees of the Town of Huntington, Suffolk County, and their successors in office for the purpose of oyster cultivation. Provided nothing in this act shall be held to interfere with the rights and powers of the Commissioners of the Land Office to grant all the right, title and interest of the State to lands under waters in said bay, to the owners of adjacent uplands for the purposes of commerce or beneficial enjoyment. And nothing herein contained shall be construed as interfering with the rights of riparian owners. Subject, however, and without prejudice to the legal rights, if any, of such persons as now have oysters planted on the lands aforesaid.

SEC. 2. This act shall take effect immediately."

The appellants criticise this act and say it permits the grantees to cultivate oysters there, but gave them no exclusive right.

The language of the grant is " all the right, title and interest which the people of the State of New York have, etc.," " for the purpose of oyster cultivation."

It is a fact that cannot be disputed that the cultivation of oysters requires the exclusive use of the soil under the waters. There is no ambiguity about the act, its language is plain, it requires no interpretation or resort to any rules of construction to determine its meaning, consequently it is not a case calling for the application of the rule that a public grant is to be construed strictly against the grantor.

It is not a part of Huntington Bay that is ceded, it is the whole of it ; if the Board of Trustees under this ceding act get the right to use part of the bay, they get the right to use the whole.

By way of illustration, take the example of Congress authorizing the building of the Brooklyn Bridge in conjunction with acts of the Legislature of the State,

specifying the locality to be used, but the act says nothing about an exclusive right; after this Congress passes an act authorizing the erection of another bridge between Brooklyn and New York Cities, could the grantors in the second act build on the location granted to the first; it would be absurb to so maintain. Why? Because the granted use of the locality in the first act necessarily made it exclusive, that the right granted might be enjoyed. So here, "for oyster cultivation" necessarily makes it exclusive that the right granted may be enjoyed.

In Charles River Bridge vs. Warren Bridge, 7 Pick., 344, 462, MARTIN, Judge, speaking of public grants said, "Although no distinct right will pass by implication, yet I do not mean to question that the words used should be construed in their most natural and obvious sense, and that whatever is essential to the enjoyment of the thing granted will be necessarily implied in the grant."

Apply this to the facts of the case at bar, "for the purpose of oyster culture." It is essential to the enjoyment of oyster culture that it be exclusive.

Again the same Judge says: "The authority to build a bridge is granted by implication, but it is a necessary implication; without it the grant would be an absurdity and nullity."

So here, if the right granted "for oyster cultivation" is not exclusive, the ceding act would be an absurdity, a nullity.

In this same case reported in 11 Peters, U. S., 420, TANEY, C. J., says at page 549: "In charters of this description no rights are taken from the public or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiff in error contends for." Such is not the case at bar. MCLEON, J., says at page 557, "In ordinary cases a grant is construed favorably to the grantee and against the grantor. But it is con-

tended that in governmental grants nothing is taken by implication. The broad rule thus laid down cannot be sustained by authority. If an office be granted by name, all the immunities of the office are taken by implication.

Whatever is essential to the enjoyment of the thing granted must be taken by implication; and this rule holds good whether the grant emanates from the royal prerogative of the King of England or under an Act of Legislature in this country."

In Langdon vs. Mayor, etc., 93 N. Y., EARL, J., delivering the opinion of the Court, says, at page 144: "But when the sovereign grants land under water, which cannot in its natural state be subjected to any of the uses to which dry land may be devoted, then a different rule of construction must be applied to the grant, so as to make it effectual for some purpose.

"Such a grant may be made to give an exclusive right of fishing, or of navigation, or to enable the grantee to fill up the land for wharves and docks or other buildings. The purpose may be plainly expressed in the grant; if it be not, then the intent of the parties must be ascertained from the nature and situation of the land granted and all the circumstances surrounding the grant which may properly be considered for the purpose of ascertaining such intent."

If we admit the purpose of this ceding act is not plainly expressed in the act, then we have the circumstances and surroundings of the grant; it is a body of land under water; the cultivation of oysters renders it necessary that the use be exclusive. Again, the grant is virtually made to a town and for the use of its inhabitants; they already had the ordinary right, as other citizens, to use these lands in common with others to catch natural growth oysters therefrom, if any, and the common-law right to plant where no natural growth existed; if the grant is not exclusive and so intended, then it only grants what they already enjoyed, making the grant an absurdity.

But the plaintiff in error claims he has some rights reserved by virtue of the following words of the ceding act: "Subject, however, and without prejudice to the legal rights, if any, of such persons as now have oysters planted on the lands aforesaid."

Of necessity the "legal rights, if any," thus referred to, must be legal rights against the grantor, the State.

Assuming that the appellant in error was a resident of this State, what legal rights did he have against the State?

No act was ever passed by the State allowing these lands to be taken and cultivated for oyster culture. The appellant held his oysters under the common-law right declared by the courts; to-wit, that a citizen might stake out and define lands under water where no oysters grow naturally, and plant it, and could maintain trespass against any person taking the oysters thus planted so long as he kept it defined by stakes and buoys. Such is the doctrine of all the cases.

Fleet vs. Hegeman, 14 Wend., N. Y., 46.
Brinckerhof vs. Storkins, 11 Barb., N. Y., 248.
State vs. Taylor, 77 N. J., 117.
McCarty vs. Holman, 22 Hun, N. Y., 53.

In no case, we believe, has it been held that trespass could be maintained for disturbing such lands, but for the taking of the oysters, which were held to be in the nature of wild animals reclaimed. At common law, the right of a person, as between himself and the State, to plant oysters on premises within the State, was at most a license or permission to plant and gather under certain conditions, and be protected in his ownership in the oysters thus planted against third persons taking them, the State having the legal right at any time to terminate or withdraw the license.

Fleet vs. Hegeman, 14 Wend., N. Y., 41.
Post vs. Kreischer, 32 Hun, N. Y., 48.

This case was reversed on appeal, but the reversal was on another point. The reasoning of the Court below on the point stated was not questioned.

Post vs. Kreischer, 103 N. Y., 110.

The learned counsel for the appellant in this case used this language in his points in another case on this subject: "If Huntington Bay was not within the limits of the patents to Huntington the defendant, or his employees had, by their staking out and planting, acquired a right, as against all persons except the State, to the use of his bed. The State indeed could exclude him, or by an exclusive grant to others authorize them to exclude him."

Their argument was that the grant was not exclusive. If we are right that it is exclusive, it disposes of all rights claimed by the appellant under the reservation clause, so far as relates to any interest in the lands.

But assuming, for the sake of argument, there was a legal right reserved by the statute to the appellant, and that it was the right to the oysters planted, on the theory that personal property wrongfully put upon the land of another could not be confiscated, any right of this kind was satisfied by the Board of Trustees serving on the appellant the following notice—to wit:

"You will please to take notice that the Board of Trustees of the Town of Huntington hereby give you notice not to put or plant any oysters on any lands under the waters of Huntington Bay, Town of Huntington, Suffolk County, and that they also demand and request you to take up and remove all oysters planted or claimed by you, or in which you are interested and now on such lands; that they desire to lease said lands to parties applying and who have applied therefor for oyster cultivation.

"You are further notified that said Board are willing to give you a hearing, on your request, as to what length of time is a reasonable and necessary one for you to

have to remove such oysters as you may now have thereon or are interested in from such lands.

" Dated May 18, 1888.

" By order of said Board of Trustees,

" By CHARLES R. STREET and

" N. S. ACKERLY,

" Their Attorneys and Counsel.

" To THEODORE S. LOWNDES."

See page 2, folio 4, of Record, where service of this is alleged by defendant in error, and page 11, folio 21, where it is admitted.

But appellant took no notice of this. In the pleadings and on the trial of this action he made no claim that he had not had sufficient time given him to remove his oysters, and, if he had any such claim, he has waived it.

So far we have discussed this point assuming the appellant was a resident of the State of New York; but, in fact, he was a non-resident of the State, and had been since 1872; at page 85 of transcript he says: "I moved into the State of Connecticut, I think, it was 1871, about 1872." The State may exclude citizens of another State from using its lands under water to plant oysters therein.

McCready vs. Virginia, 94 U. S., 391.
Smith vs. Maryland, 18 How. U. S., 71.

It was held in Honey vs. Compton, 36 N. J. Law, 507, that the statute of the State prohibiting non-residents from gathering oysters within the waters of New Jersey operated alike as to natural or planted oysters. That it did not controvene the provisions of the United States Constitution that the citizens of each State shall be entitled to all the privileges of citizens in the several States.

It was held in Chambers vs. Church, 14 R. I., 398, that a State may forbid non-residents catching fish in

its waters for manure and oil and manufacturing manure and oil from fish caught within its waters.

The Colony of New York, and the State after it, has always prohibited to non-residents the use of its waters for oyster fisheries.

Act of Colonial Legislature (see page 10[illegible] of Record).

This was continued in force by Section 35 of the first Constitution of the State of New York as follows: "And this convention doth further, in the name and by the authority of the good people of this State, advise, determine and declare, that such parts of the common law of England and of the Statute Law of England and Great Britain, and of the Acts of the Legislature of the Colony of New York, as together did form the law of the said colony on the 19th day of April, 1775, shall be and continue the law of this State, subject to such alterations and provisions as the Legislature of this State from time to time make concerning the same. That such of said acts as are temporary, shall expire at the time limited for their duration respectively."

This is again repeated in Section 13 of Article 12 of the second Constitution adopted in 1821, and again in Section 17 of Article I., adopted in 1846.

### Chap. CCXI., Laws of New York, 1817.

An Act for the preservation of shell and other fish within this State.

Passed April 11th, 1817.

I. Be it enacted by the people of the State of New York, represented in Senate and Assemby: That no person residing out of this State, shall rake, gather or take and shell or other fish in any of the waters of this State, or on the shores adjoining such waters; and every such person offending against the provisions of this act shall, for every offense, forfeit and pay the sum of twenty-five dollars, to be recovered with costs of

suit, on the complaint of any citizen of this State, who will sue for the same before any Justice of the Peace within this State, in a summary way; one moiety whereof, when recovered, shall be paid to the informer, and the other moiety to the Overseers of the Poor of the city or town where such offender shall be prosecuted, for the use of the poor thereof.

II. And be it further enacted, that instead of fifty dollars, the forfeiture shall be twenty-five dollars, for any offense under the second section of an act, entitled "An Act to protect the fishing in Hudson's river, and to prevent obstructions in the navigation," passed April 11th, 1815.

Section 441 of the Penal Code of the State of New York, reads: "Sec. 441. Non-resident taking or planting oysters. A person who, not being at the time an actual inhabitant and resident of this State, plants oysters in the waters of this State, without the consent of the owner of the same, or of the shore, or gathers oysters or other shell fish from their beds of natural growth, in any such waters on his own account, or for his own benefit, or the benefit of a non-resident employer, is guilty of a misdemeanor, punishable by imprisonment not exceeding six months, or by a fine not exceeding one hundred dollars, or both."

This act went into effect December 1st, 1882 (see Section 727 of the Code).

This act was passed years before this action was commenced, and before any present oysters of appellant were planted, and long before the ceding act of the State.

Again, Section 4, Chapter 584, Laws of N. Y., 1887, reads: "Sec. 4. No grant shall be made to any person or persons who have not resided in this State at least one year preceding the date of application, and no grant shall be made to any person, firm or corporation in excess of two hundred and fifty acres, and no person,

firm or corporation shall be allowed to hold, at any one time, more than two hundred and fifty acres."

This is an act to dispose of State lands for oyster culture.

Again, the laws of the State of New York delegate certain legislative powers to the Boards of Supervisors of the different counties. Among other things is the right to protect the fisheries.

Subdivision 13 of Section 14, Chapter 194 of Laws of 1849, reads, as affects this question, as follows: "To make such laws and regulations as they may deem necessary for the destruction of wild beasts, etc., etc., and to provide for the protection of all kinds of game, of shell fish and other fish, within the waters of their respective counties, etc., etc.

This is authorized by Section 17 of Article 3 of the Constitution of 1846:

"SECTION 17. The Legislature may confer upon the Boards of Supervisors of the several counties of the State such further powers of local legislation and administration as they shall from time to time prescribe."

The Board of Supervisors of Suffolk County, N. Y., passed the following Act December 5th, 1875:

"An Act for the protection of the fisheries within the waters of Suffolk County, and their preservation to the exclusive use and enjoyment of the inhabitants of said county, by forbidding all persons other than the inhabitants of said county from engaging therein."

The authority to pass this resolution is found in Chap. 194 of Laws of 1849 (Section 4, Subdivision 13) and Chap. 482 of the Laws of 1875.

It was passed December 15, 1875, by a vote of two-thirds of all the members elected.

The Board of Supervisors of the County of Suffolk, at a meeting thereof lawfully assembled, at least two-thirds of all the members being present and voting therefor, to enact as follows:

"SECTION 1. It shall not be lawful for any person, not an inhabitant of the County of Suffolk, to take or catch any fish, commonly called shell-fish, or any eels, clams, escallops or other shell-fish within the public waters of the said county. Any person who shall violate any provision of this section shall be held to a penalty of fifty dollars for each offense."

Section 2 provides for its enforcement, etc.

Subdiv. 16 of Sec. 1 of Chap. 482, Laws of 1875, above referred to reads:

"16. To provide for the protection and preservation, subject to the laws of this State, of game, animals and birds and of fish and shell fish in all waters within the territorial jurisdiction of the county, and to prescribe and confer the collection of penalties for the violation of any laws or regulations they may make pursuant to the provisions of this subdivision."

In the case of Smith vs. Levinus, 8 N. Y., 472, this class of legislation was held valid.

It was also held that the Legislature might delegate authority to regulate these fisheries, in People vs. Thompson, 30 Hun, N. Y., 457; Smith vs. Vandevere, 47 Hun, N. Y., 366.

By Chap. 64, Laws of 1788, it will be seen power was given to towns over their common lands (see page 41 of Record).

Again the Revised Statutes of New York, passed in 1830, provide in 2 R. S., page 881 (Banks & Bros'. 6th Edition): "Each town, as a body corporate, has capacity to make such orders for the disposition, regulation or use of its corporate property as may be deemed conducive to the interests of the inhabitants."

The Town of Huntington made numerous orders and regulations at town meetings, from time immemorial, excluding non-residents from the use of its fisheries within the limits of its grants.

Theodore S. Lowndes, the appellant, has not been a resident of the town since he planted in the bay, and

not a resident of the State since 1872, and therefore acquired no right or license to plant in these waters as against regulations of both town, county and State, and, therefore, had no rights that were reserved to him by the ceding act. If the appellant argues that unless some right is conceded to have been reserved then the reservation has nothing to act upon, and is contrary to the rule of construction given in such cases; we say it is answered by the words "*if any*," after the words "legal rights." By the act itself the State does not pretend to say he has any legal right, it only says, *if* he has any they are reserved.

Again, an oyster fishery is a property right, originally in the sovereignty, and where granted away by the sovereign power it is vested in the grantee, and the Legislature of a State may protect this property right by prohibiting non-residents from taking or planting oysters within its limits.

Patterson's Federal Restraints on State Action, Chap. XI.
Gould on Waters, Chap. I., II.
Cornfield vs. Coryell, 4 Wash. C. C., 371.
Smith vs. Maryland, 18 How., 71.
McCready vs. Virginia, 94 U. S., 391.
Manchester vs. Massachusetts, 139 U. S. Repts., 259, 260.
Pollard's Lessee vs. Hagan, 3 How., 212.
State vs. Medburry, 3 R. I., 138.
Hanay vs. Compton, 36 N. J. Law, 507.
Day vs. Compton, 37 N. J. Law, 514.
McCready vs. Commonwealth, 27 Gratt., 985.
Russell vs. Russell, 15 Gray, 159.

While an oyster fishery is a property right in the State, where not granted away, it is a property right in either the grantees of the State or a town holding under a colonial grant, and will be protected as against non-residents under State authority.

Smith vs. State, 18 How., 591.
Sherlock vs. Alling, 93 U. S., 99.
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Smith vs. State, 18 How., 591.
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Rogers vs. Jones, 1 Wend., 251.

Hallock vs. Dominy, 69 N. Y., 238.
Paul vs. Hazleton, 37 N. J. Law, 106 and 163.
Averill vs. Hull, 37 Conn., 321.
Gullup vs. Tracy, 25 Conn., 10.

**Wherein the case of the Illinois Central Railroad vs. The State of Illinois is distinguishable from the case at bar :**

The case of the Illinois Central Railroad Company vs. State of Illinois seems so widely distinguishable from this case that it is difficult to see how the reasoning of the opinion of the Court can be made applicable to the latter. Great importance was there attached to the claim that the legislative grants to the Railroad Company had the effect of depriving the City of Chicago or the State of Illinois of the control of navigation upon the water front of that city, but here no question of navigation is involved under either the royal grants nor the Ceding Act of the Legislature to the Town of Huntington.

The growth and cultivation of oysters on the bottom of Huntington Bay, further from the shore than wharves or other structures in aid of commerce are required, as in this case, can in no manner infringe upon the public right of navigation. There is no pretense that the Town of Huntington holds any control over navigation in the premises in question.

Nor does the question of riparian rights arise here, as in the Illinois case. There it seems to have been controlling in connection with the subject of public navigation, inasmuch as the title of the railroad corporation was affirmed, as we understand the opinion of the Court, as to such parts of the lands under water conveyed by the legislative grant as lay immediately adjacent to lands owned by the railroad corporation provided navigation should not be obstructed; while, on the other hand, it declared invalid

the claim of the railroad corporation to submerged lands adjacent to the uplands of others, and where the riparian right had not been acquired by it. Here the cultivation of oysters upon premises so distant from the shore, as shown in the proofs, cannot affect riparian rights; nor can it be claimed that the colonial grants to the town were invalid as infringing upon the riparian rights of others, for these grants, made for the purposes of settlements, embraced all the uplands to which these waters were adjacent, so that the riparian right went with the grants to the upland. The act of the Legislature ceding Huntington Bay to the town for oyster cultivation, excludes so wide a margin adjoining the shore from its operation that neither riparian owners are interfered with nor navigation obstructed.

There is another feature of this case which distinguishes it from the Illinois case. While the power of the Legislature of Illinois to make such a grant as was made, in the first instance, to the private railroad corporation, was discussed in the opinion of the Court, the decision seems to have turned chiefly upon the validity of the legislative act repealing the former act which made the grant, and the validity of the repealing act was sustained as a proper exercise of the police power of the State; but no such conditions exist in this case. Neither the colonial grants nor the ceding act by the State, on which the claims of the Town of Huntington rest, have been revoked or abrogated; but, on the contrary, as we have seen, they have been ratified by Legislative and constitutional provisions, and strengthened by every possible act of sovereign power. Hence, the reasoning of the Court in the Illinois case concerning the power of a Legislature to abrogate a former grant, and the distinctions there discussed arising out of the status of the grantee—whether a private corporation or a public municipality—do not apply here. The police power of this State has not been directed against these grants, but always in aid thereof.

Again, the Illinois case deals directly with the question of a claim by the corporation of unqualified fee-simple title to lands under water under the act making the grant to it; the unqualified ownership absolutely essential to the use of premises which were to be filled in and occupied for the uses of the railroad corporation, and such uses would be necessarily destructive to all other right. Here, however, we are dealing with a question of oyster fishery, which, we submit, need not carry with it a fee-simple title to the soil, for, although the Town of Huntington claims a full title subject to public navigation, if the Court should deem the claim untenable, or hold that the colonial grants are not to be construed as conferring such absolute title, the town may still have a right to a several oyster fishery on the premises and the right to recover the premises if illegally withheld. The opinion in the Illinois case quotes with approval the views of Mr. Justice BRADLEY, in the case of Stockton vs. Railroad Co., 32 Fed. Rep., 9, where he says:

"It is true that to utilize the fisheries, especially those of shellfish, it was necessary to parcel out to particular operators and employ the rent or consideration for the benefit of the whole people, but this did not alter the character of the title; the land remained subject to all other uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries." It was held in this case that there was no necessary conflict between the right of title to regulate the fisheries in a given locality, and the right of the United States to regulate commerce and navigation in the same locality. This was cited with approval in Buzzard Bay case, Manchester vs. Massachusetts, 139 U. S., 240.

In the latter case it was held that the State of Massachusetts could extend its jurisdiction over Buzzard's Bay, the entrance to which was six geographical miles wide, and control its floating fisheries.

This is a clear recognition of the right of the sovereign power to grant a several oyster fishery, and the reasons for it are grounded in the necessities of the case—"the utilizing of the shell fisheries"—an industry which has, in the progress of the country, assumed vast proportions, and which, in order to be successfully conducted, requires occupation of premises for three or four years while a crop of oysters are maturing. The State cannot properly engage in oyster cultivation, and surely it would be against public policy for the great tide-water territory within the maritime States to remain a useless waste in order that these lands under water might be kept absolutely free to all the citizens of the State. Here the policy, from colonial times down, has been to confer on the towns bordering on the sea the control of such fisheries within appropriate limits, vesting the right, as in the case of the Town of Huntington, in trustees, empowered to parcel them out to its inhabitants for appropriate periods and on reasonable terms; and, since the Revolution, and a change of soverignty, these rights in the towns have been recognized; while, on the other hand, the State has, by legislative enactments before referred to, and usually through Boards of Oyster Commissioners, granted, in appropriate parcels, to its own citizens, the exclusive use of those wider areas of tide waters which had not been heretofore granted to the towns. We submit that the State of New York, in pursuing this policy regulated by law, violates no right of any citizen of the State, and best performs its duty as trustee for the people, and such laws of the State, including the act which grants to the Town of Huntington the oyster fisheries in Huntington Bay, are valid, and not in violation of any trust under which they may have been held by the sovereign State. As appears by the proofs in this case, the town does not itself conduct the fishery, but leases the premises in small parcels to residents of the State, and no person is interfered with in respect to his riparian rights or free navigation of the waters.

## VI.

### Ejectment is maintainable in this case.

Ejectment is the proper action to procure an adjudition of title and right to lands under water where appropriated by parties as an oyster fishery. This action is brought more especially under Section 1502 of the Code of Civil Procedure of the State of New York, which reads as follows:

"SEC. 1502. Against whom the action is to be brought: Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an *interest therein, at the time of the commencement of the action.*"

The action is maintainable.

Trustees of Southampton vs. Mecox Bay Co., 116 N. Y., 1.
Town of North Hempsted vs. Thompson, 115 N. Y., ~~135~~ 635

## VII.

### The numerous objections to the documentary evidence are necessarily disposed of in the discussion of the questions involved, and if defendant in error is sustained then such evidence was proper.

The Judge properly directed a verdict for the defendant in error.

The construction of the patents and ceding act was one for the Court.

It was so treated in Brookhaven vs. Strong, 60 N. Y., 72, the trial Judge, GILBERT, therein directing a verdict, and in the Town of North Hempstead vs. Thompson above cited.

## VIII.

In the appendix is printed the opinion given orally by Judge LACOMBE on the decision of the case, also statutes relating to creating Board of Trustees, and to establishing boundary line though Long Island Sound with State of Connecticut, and ceding acts of State of New York to United States of lands on Long Island Sound.

**The judgment of the lower Court should be affirmed with costs.**

N. S. ACKERLY,
Attorney.
C. R. STREET,
THOS. YOUNG,
DAVID B. HILL,
Of Counsel.

# APPENDIX.

## Decision.

LACOMBE (Circuit Judge) Orally:

As to the construction of these ancient Charters touching the character of the estate they convey, this Court will follow the rulings of the Courts of this State.

The next question is as to the extent, territorially, of these patents. Ordinarily, a bay is spoken of as a distinct body of water, distinct from the sea or from the arm of the sea out of which it opens. Sounds and arms of the sea are said to flow into and out of the bays, and bays to open into sounds. In this particular case, there seems to be a measure of doubt as to the location of the line of the Sound in the light cast upon it by some of these deeds which have been introduced. The boundary of Eaton's Neck as granted at about the time of this patent makes it seem uncertain as to exactly where the Sound ended. These points were before Judge CULLEN, I see, in the case of Ackerly against Godfrey, and he there sustained the Plaintiff's view as to the boundary by the Sound. In this particular case, however, I do not think it necessary to determine precisely what would be the north and south limits of this patent if we only had the words "by the Sound" and "by the Sea." The use of the word harbor and haven seems to be sufficient to carry this particular body of water. I do not know that there is any rule of law or any principle or practice of common speech which requires that a harbor shall be land-locked, or that a haven shall be absolutely safe from every wind that blows. The grants from the Sovereign, as well as Acts of Legislatures or documents generally, are to be interpreted by giving to the words which they contain, in the absence of anything

to indicate a contrary meaning, the plain, ordinary meaning which they have in the educated speech of people by whom the language is employed.

This particular body of water geographically indicates that it may be used as a haven or harbor, and the geographical appearance of the land is to be taken largely into consideration here, for these grants were made at a time when, I infer, the north shore of Long Island was not used to any particular extent for the purposes of navigation, it not being much settled at that time. The geographical appearance, then, of this body of water, bounded on three sides by land, would indicate its appropriateness as a harbor or haven, and experience, as to which we have been advised through the testimony of the witnesses, leaving out of view any points of dispute between them—goes to show that it has been used as a harbor or haven. It is not a perfectly safe harbor nor an absolutely secure haven. It is a place which, when the wind is blowing or is threatening to blow from a northerly point, it is desirable, perhaps, to leave, but, when the wind comes from the east or south or west, it is a place which, in those circumstances, will afford a reasonably secure place of harbor and a reasonable haven for ships.

It seems that under the language of these grants then, the title to the land in controversy was given to the town of Huntington.

It only remains to consider the effect of Defendant's use and occupation of the particular part of that land which he has used and occupied. With regard to this use and occupation, it is to be noted that it is not in character continuous. When he originally began to use the land, to occupy it by putting his personal property upon it, he claimed that he had a species of title to the land as a citizen of the State of New York; that he, in common with all his fellow citizens, had an equitable title to those lands, the legal title being in the State, in trust for the common purposes of its

citizens. Under the law of the State, I do not mean the Statute law, under the law of the State, if the title were still in the State he could (in that territory as to which he, with others, had a common title), by the performance of certain acts thereon, segregate, as it were, a portion of such territory, so that as to that, it might be said that his occupation and use of the portion thus segregated might become exclusive. Now, even conceding that the legal title was still in the State, and that this right which he obtained by actual occupation and use might be considered an equitable property right which he had there, his occupation in assertion of such property right continued only for six years. In 1872 he moved out of the State of New York; ceased to be a citizen of the State. When I was considering this case yesterday I was inclined to the opinion that the rights to the common lands held by the State were rights which, in the absence of anything to the contrary, were to be participated in by all the inhabitants of the Union. Since the argument yesterday, and after examining the subject more carefully and giving it further thought, I am inclined to change that opinion. When the individual States succeeded to the sovereignty of England, and took the title to the property which theretofore the Crown of England had held, each State held that property—that is, such of it as was held in common—in trust for its own citizens, and no property right whatever in the land so held by one State belonged to the citizens of an adjoining State. That being so, when the Defendant removed from the State and gave up his citizenship, he at the same time yielded up whatever equitable right of ownership he had in these premises. From and after that date, whatever occupation and use he had was the occupation and use of a trespasser only, which could not ripen by any lapse of time; certainly, could not ripen by the lapse of sixteen years into either a title in fee or a right to continue the use.

In this view which I take of the character of the

occupation, I am inclined to the opinion that the Defendant has not succeeded in establishing his right to continue to occupy this land as he has occupied it in the past. I shall, therefore, direct a verdict for the Plaintiff.

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CHAP. 492, L. 1872.

AN ACT to abolish the office of the Trustees of the Freeholders and commonalty of the town of Huntington, in the town of Huntington, county of Suffolk, and to create their successors.

Passed May 3, 1872; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. On and after the first Tuesday in April, in the Year one thousand eight hundred and seventy-two, the office of trustees of the freeholders and commonalty of the town of Huntington, in the town of Huntington, in the county of Suffolk, shall be abolished and cease to exist.

SEC. 2. The supervisor, town clerk and assessors of the town of Huntington, and their successors, are hereby created *ex officio* the board of trustees of the town of Huntington, and legal successors of the trustees of the freeholders and commonalty of the town of Huntington, and vested with all the rights, privileges, powers, duties and jurisdiction heretofore enjoyed and exercised by such trustees over the real and personal property of the town of Huntington. The supervisor of the town shall be *ex officio* president of the board of trustees of the town of Huntington hereby created.

SEC. 3. The president of the trustees of the freeholders and commonalty of the town of Huntington shall, upon demand, deliver to the president of the board of trustees of the town of Huntington, hereby

created, and after the date aforesaid all records, books, papers, documents, moneys and property belonging to said town and then in his possession or under his control.

SEC. 4. All acts inconsistent with this act are hereby repealed.

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CHAP. 213, L. 1880.

AN ACT to ratify and confirm the agreement in relation to the boundary lines between the State of New York and the State of Connecticut, entered into by commissioners on the part of said States.

Passed May 8, 1880; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

SECTION 1. The agreement for the settlement of the boundary lines between the State of New York and the State of Connecticut, entered into by the commissioners appointed for that purpose on the part of said States, respectively, a duplicate original of which is on file in the office of the secretary of State, and a copy of which has been reported to the legislature, is hereby ratified and adopted. The said agreement is as follows namely: "Memorandum of agreement by and between the subscribers, commissioners of the State of New York and Connecticut, respectively, to settle the question of the boundaries between said States, being thereunto authorized by the resolutions of said States respectively passed by them, is hereunto annexed. That is to say, we, Allen C. Beach, secretary of State; Augustus Schoonmaker, Jr., attorney-general, and Horatio Seymour, Jr., State engineer and surveyor, commissioners of the State of New York, and we, Origen S. Seymour, La Fayette S. Foster and William T. Minor, commissioners of the State of Connecticut, have agreed and do hereby agree to fix, determine and establish the boundaries between our respective states,

subject to the approval and ratification of the legislatures of our respective States, in the following manner: We agree that the boundary on the land constituting the western boundary of Connecticut and the eastern boundary of the State of New York shall be and is as the same was defined by monuments erected by commissioners appointed by the legislature of the State of New York and completed in the year eighteen hundred and sixty. The said boundary line extending from Byram Point, formerly called Lyon's Point, on the south, to the line of the State of Massachusetts on the north. And we further agree that the boundary on the south shall be and is as follows: beginning at a point in the centre of the channel about six hundred feet south of the extreme rocks of Byram Point, marked No. 0, on appended United States Coast Survey Chart; thence running in a true south-east course three and one-fourth statute miles; thence in a straight line (the arc of a great circle) north-easterly to a point four statute miles true south of New London light-house; thence north-easterly to a point marked number one on the annexed United States Coast Survey Chart of Fishers Island Sound, which is on the latitude east three-quarters north sailing course drawn on said map, and is about one thousand feet northerly from the Hammock or North Duppling light-house; thence, following said east three-fourths north sailing-course as laid down on said map, easterly to a point marked number two on said map; thence southeasterly toward point marked number three on said map, so far as said States are co-terminus; provided, however, that nothing in the foregoing agreement contained shall be construed to affect existing titles to property, corporeal or incorporeal, held under grants heretofore made by either of said States, nor to affect existing rights which said States, or either of them, or which the citizens of either of said States, may have, by grant, letters patent or prescription of fishing in the waters of said sound, whether for shell or floating fish, irrespective of the

boundary line hereby established, it not being the purpose of this agreement to define, limit or interfere with any such right, rights or privileges, whatever the same may be.

In witness whereof we have hereunto set our hands to this instrument, and to a duplicate thereof, December eighth, eighteen hundred and seventy-nine.

ALLEN C. BEACH,
Secretary of State;
AUGUSTUS SCHOONMACHER,
Attorney-General;
HORATIO SEYMOUR, Jr.,
State Engineer and Surveyor;
Commissioners of the State of New York.
ORIGEN S. SEYMOUR,
LAFAYETTE S. FOSTER,
WILLIAM T. MINOR,
Commissioners of the State of Connecticut."

SEC. 2. The governor is authorized and requested to transmit a copy of this act to the governor of the State of Connecticut, and, upon receiving due notice of the adoption of said agreement by the State of Connecticut, the governor of this State shall cause such notice to be filed in the office of the Secretary of State, and, upon the same being so filed, the said agreement shall become binding and operative and in full force, and the boundary between this State and the State of Connecticut shall be fixed and established as specified and provided in said agreement.

SEC. 3. Upon the said agreement taking effect as herein provided, the governor is authorized, in concurrence with the executive of Connecticut, to communicate to congress the action of the two States on this subject, and to request the approval of congress of the boundaries thus established.

See pages 72, 73, 74 and 75 of Record, showing certificates filed by the Governors, &c.

CHAP. 695, L. 1881.

AN ACT extending the jurisdiction of Queens and Suffolk counties and of certain towns thereof, over the waters of Long Island Sound.

Passed August 12, 1881.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The boundary line between the counties of Queens and Suffolk is hereby entended northwardly into Long Island Sound at a right angle to the general trend of the coast until it intersects the boundary line between the States of New York and Connecticut, as lately established by the commissioners of the States, and confirmed by the respective legislatures thereof.

SEC. 2. The boundary lines of the several towns in the counties of Queens and Suffolk that adjoin Long Island Sound are hereby extended northwardly into Long Island Sound at right angles to the general trend of the coast at their several respective points, until they intersect the boundary line between the States of New York and Connecticut as lately established by the commissioners of the said states and confirmed by the respective legislatures thereof.

SEC. 3. The jurisdiction of the legally constituted officers of Queens and Suffolk counties, and of the respective towns of said counties bordering on Long Island Sound, is hereby extended over the waters of said sound to the Connecticut state line.

SEC. 4. This act shall take effect immediately.

CHAP. 432, L. 1874.

AN ACT ceding jurisdiction over certain upland and sub-marine sites in the State of New York for light-house purposes of the United States.

Passed May 11, 1874, by a two-thirds vote.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Jurisdiction is hereby ceded to the United States over so much land as from time to time has been deeded to and occupied by them for the construction and maintenance of light-houses and keepers dwellings within this State, sketches and descriptions of which, by metes and bounds, have been filed in the office of the Secretary of State on the twentieth of April, eighteen hundred and seventy-four, viz.:

Also for the lands lying under water, and known as sub-marine sites, sketches and maps of which by metes and bounds have been furnished by the United States, were filed in the office of Secretary of State on the twentieth day of April, in the year one thousand eight hundred and seventy-four, viz.:

*No. 6.* Hart's Island, situated in Long Island sound, Westchester county, New York, at the south end of Hart Island, under water and beyond low water mark, containing three acres and seventy-five hundredths of an acre.

*No. 7.* Execution Rocks, Long Island sound, one hundred feet in diameter, containing less than an acre, situated seven-eighths of one mile north of Sand's Point light, and five miles to the northeast of Fort Schuyler.

*No. 10.* Stratford shoal, Long Island sound, New York, contains an area of less than one acre.

*No. 11.* Race Rock, off Fisher's Island point, at the western entrance to Fisher's Island sound, Suffolk county, New York, containing an area of less than one acre.

*No. 22.* Bradford reef, abreast of Bradford harbor, Long Island sound, New York, containing an area of less than one acre.

*No. 24.* Oyster-pond point, plum gut entrance to Gardiner's bay, Long Island sound, Suffolk county, New York, containing an area of less than one acre.

*No. 25.* The Stepping Stones, about one mile south of Hart Island, Long Island sound, New York, containing an area of less than one acre.

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CHAPT. 128, L. OF 1883.

Jurisdiction and ownership is ceded to the United States over site proposed for a light House at Latimer's reef, Fisher's Island sound, New York, the area embraced within a circle seven hundred feet in diameter, the centre of which the spindle now marking the said site of Latimer's Reef.